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THE UNITED STATES SENATE
1787-1801

A DISSERTATION ON THE FIRST FOURTEEN YEARS OF THE UPPER LEGISLATIVE BODY

PREPARED BY

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OF

SEATTLE PACIFIC COLLEGE

PRESENTED BY MSSRS. DOLE, GORTON, AND BYRD

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IN THE SENATE OF THE UNITED STATES,
October 23 (legislative day, October 21), 1985.

Resolved, That Senate Document Numbered 87-64, entitled "History of the United States Senate from 1787 to 1801", be reprinted as a Senate document.

SEC. 2. There shall be printed, in addition to the usual number, such additional copies as are allowed subject to the limitations of section 703 of title 44, United States Code.

Attest:

JO-ANNE L. COE,
Secretary.

FOREWORD

"The United States Senate 1787-1801" by Roy Swanstrom was prepared as a requirement for the degree of doctor of philosophy in history, in the graduate division of the University of California.

This study has been praised by the Library of Congress as a complete and exhaustive work, and as a valuable and lasting contribution to the literature on Congress.

On April 6, 1989, we will celebrate the bicentennial of the United States Senate. On that date in 1789, Richard Henry Lee of Virginia arrived in Philadelphia, completing a quorum for the first Senate of the United States. As the bicentennial grows near, the Senate's history will be the subject of much study by academics and other interested people across the nation. This work will serve as a valuable resource to those studying the history of the United States Senate.

ROBERT DOLE,
SLADE GORTON,
ROBERT BYRD.

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THE UNITED STATES SENATE, 1787-1801

CHAPTER I

INTRODUCTION

The United States Senate is the most powerful upper legislative body in the world. Its place in the contemporary political scene is so firmly established that a competent observer has recently called it "the one touch of authentic genius in the American political system" apart from the Constitution itself.[1]

When the tidal wave of democracy swept away much of the power of the British House of Lords and similar upper chambers throughout the Western World, the United States Senate maintained its prerogatives intact and shared the rise to worldwide power and prestige of the American Nation itself.

Why was this so? Obviously, part of the answer lies in the fact that the United States Senate has always been based, first indirectly and now directly, on popular choice. However, this is only a partial answer, since other upper chambers which have also been based to a considerable extent on the popular will have not maintained a commensurate place in the political life of their respective countries. This study is an effort to find a further answer in the history of the Senate's early years—when the first precedents were set, when threats to its continued existence were overcome, and when, after false starts, it found its place in the pattern of American political life.

The story must begin in the State House at Philadelphia, where the delegates to the Constitutional Convention debated and framed a new structure of government for the United States, including the form and powers of the Senate. It must observe the meeting of the first Senators at New York City and follow them and their successors as they struggled with problems of their day at that city, at the second temporary capital at Philadelphia, and finally at the new wilderness capital at Washington.

The work of the Constitutional Convention was, of course, crucial, but it was only a beginning—a blueprint for the use of the builders who were to follow. William Gladstone's famous statement that the American Constitution is "the most wonderful work ever struck off at a given time by the brain and purpose of man" has often been challenged on the ground that that document was not "struck off" like a shiny new coin at the Philadelphia mint, but was the logical culmination of centuries of political activity in England and America. Unfortunately, it has been equally easy to make the parallel mistake of assuming that, once the Constitution was the supreme law of the land, a new government embodying its formulas automatically sprang into full-panoplied existence. Actually, erecting a government from the blueprint drawn at the Constitutional Convention was a laborious and difficult task, accompanied by problems and dangers as critical as the ones faced at Philadelphia in 1787.

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[1] William S. White, *The Citadel* (New York: Harper & Bros., 1957), p. ix.

In the last few years several works have appeared describing the problems involved in "putting the machine in some regular motion," to use a metaphor of that day. James Hart's *The American Presidency in Action, 1789* describes the problems George Washington faced and solved in his first year in the Presidency.[2] Leonard D. White's *The Federalists* emphasizes the policies developed by the leaders in charge of the executive branch in the highly important formative years, 1789 to 1801.[3] The title of Nathan Schachner's *The Founding Fathers* is significant, for the distinction of that appellation is not given to the framers of the Constitution but to the men who manned the ship of state and steered it out of harbor in these same formative years.[4] The present writer's own curiosity concerning the Senate's early days was stimulated by 7 years' service on the staff of Senator Homer Truett Bone, of Washington.

To this writer's knowledge, no work has yet devoted itself exclusively to a study of Congress as an institution during this highly critical period, although several books dealing with Congress give good short accounts of the principal developments. Thus it may not be remiss here to focus attention on the Upper House of Congress in its infancy—to show how the Senate satisfied, or failed to satisfy, the anticipations of the constitutional fathers who drew its essential features; to describe the modes of procedure worked out by Senators in actual practice; to trace some of the stresses and strains to which the Senate was subjected before it assumed its now traditional place in the structure of American government, and possibly to contribute to an understanding of an institution whose personality is unique among the legislative bodies of the world.

Principal Sources for This Study

The inquirer into the activities of Congress during these early years must, of course, first look to the *Debates and Proceedings in the Congress of the United States* (popularly known as the *Annals of Congress*), the *Journal of the Senate of the United States*, and the *Journal of the Executive Proceedings of the Senate of the United States*.[5] Unfortunately, the information in these volumes concerning the work of the Senate is distressingly skeletal. The *Journals* outline in detail the legislative decisions made by the Senate from day to day—committees appointed, rollcall votes taken, bills introduced, committed, passed, rejected, or amended. But one can read the *Journal* for an entire session without catching the vaguest hint of the clashing political forces or even of the issues which agitated the Senators' minds. The *Executive Journal* gives the same limited degree of information about the Senate's proceedings affecting confirma- of appointments and ratification of treaties.

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[2] James Hart, *The American Presidency in Action* (New York: Macmillan Co., 1948).

[3] Leonard D. White, *The Federalists* (New York: Macmillan Co., 1948).

[4] Nathan Schachner, *The Founding Fathers* (New York: G. P. Putnam's Sons, 1954).

[5] Joseph Gales, Sr. (compiler), *Debates and Proceedings in the Congress of the United States*, 42 vols. (Washington: Gales & Seaton, 1834–56); hereafter referred to as *Annals*.

Journal of the Senate of the United States, 5 vols. (Washington: 1828). Previously published at the Capital after each session. Page numbers in the present work refer to the latter editions. Hereafter referred to as *Senate Journal*.

Journal of the Executive Proceedings of the Senate of the United States, 3 vols. (Washington: Duff Green, 1828); hereafter referred to as *Senate Executive Journal*.

For the period before 1802, the *Annals of Congress* give little additional information about the activities of the Senate. Prior to December 1795, with but one exception, the Senate Chamber was closed to the public and no accounts of the debates could be reported. After that time, newspaper editors, on whom rested the burden of reporting congressional debates, for several years ignored the Senate except on a handful of occasions, and thus few of the "upstairs" debates were recorded for posterity. However, much information can, of course, be obtained from these publications through analyses of such material as yea-and-nay votes, personnel of committees, and progress of legislation.[6]

The standard compilations of the records of the Constitutional Convention and the ratifying conventions are adequate to show the purposes of the framers in giving the Senate the form and powers outlined by the Constitution and to explain the conflicting opinions about the future Senate held at that time. In this study, Arthur Taylor Prescott's *Drafting the Federal Constitution* has been used for most of the Convention debate because it conveniently arranges the discussion by subject, including one chapter devoted entirely to the Senate.[7]

The bare skeleton of Senate procedures portrayed by official and semiofficial records is given flesh and blood in the correspondence and other papers of the actors who played principal roles in the political drama of the period. This study has utilized the published papers of President Washington; of John Adams as Vice President and as President; of Thomas Jefferson as Secretary of State, Vice President, and party leader; of Alexander Hamilton and Oliver Wolcott as Secretaries of the Treasury and as Federalist Party leaders; of House leaders such as James Madison and Fisher Ames; and of the following Senators who served during the period: Paine Wingate of New Hampshire; George Cabot of Massachusetts; Rufus King, Aaron Burr, and Gouverneur Morris of New York; William Maclay of Pennsylvania; George Read of Delaware; Charles Carroll of Maryland; Richard Henry Lee and James Monroe of Virginia; and young Andrew Jackson of Tennessee.[8]

Of these Senators, William Maclay has given, in his *Journal of William Maclay*, by far the most intimate portrayal of what transpired behind the closed doors of the Senate in its early years. Since he did not write for publication, he was not concerned with political effect, but described in detail day-by-day occurrences as he saw them. Ever since its publication a century after these events took place, this journal has been quoted more widely than any other source work in accounts of the early years of Congress. Unfortunately for the historian, Maclay drew the short 2-year term and was not reelected.

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[6] Pursuant to a Senate resolution of 1937, the Secretary of the Senate transferred to the National Archives such records as were not needed in the current business of the Senate. Thus the Archives now have many of the original documents for this period—the *Journals, Executive Journals,* bills in the form considered by the Senate, committee reports and other committee papers, petitions presented to the Senate, presidential messages, and Senate "housekeeping" records. See Harold E. Hufford and Watson G. Caudill, *Preliminary Inventory of the Records of the United States Senate* (Preliminary Inventory No. 23, multigraphed), National Archives (Washington: 1950).

[7] Arthur Taylor Prescott, *Drafting the Federal Constitution* (University, La.: Louisiana State University Press, 1941).

[8] Bibliographical information concerning these works is given under the appropriate heading in the bibliography at the end of this study.

In spite of its detailed and firsthand information, however, this journal must be read with caution, since Maclay was not a man of well-balanced judgment. His bitter prejudices, the nubilous nature of many of his criticisms, and his tendency to impute the most unworthy motives to men as upright as himself, often resulted in an unfair picture of the scenes he described. By his own admission Maclay walked "among his friends and fellow mortals as if they were briars and thorns, afraid to touch or be touched by them."[9]

Further information has been obtained from biographies, of greater or lesser length, of Senators who served during the Federalist period. These are sometimes especially helpful because their authors in many cases had access to sources not available to the present writer—in fact, in some instances to sources not now available anywhere. Biographies examined include accounts of the lives of Senators William Blount of Tennessee, Oliver Ellsworth of Connecticut, James Hillhouse of Connecticut, William Samuel Johnson of Connecticut, Samuel Johnston of North Carolina, Robert Morris of Pennsylvania, William Paterson of New Jersey, James Ross of Pennsylvania, Philip Schuyler of New York, Roger Sherman of Connecticut, Caleb Strong of Massachusetts, and John Taylor of Virgina.[10]

The *Biographical Congressional Directory* contains a brief summary of the official careers of all Members of Congress, including the Continental Congress, from the beginning to the year of publication. The *National Cyclopedia of American Biography*, the *Dictionary of American Biography*, and *Appleton's Cyclopaedia of American Biography* contain brief biographies of practically all the Senators who served during this period. On the whole, these works tend to pass over the subjects' Senate service with insufficient attention, probably due to the obscurity of the Senate's proceedings during these early years. For instance, James Gunn, who served the entire 12-year period, is dismissed by the *National Cyclopedia of American Biography* with nine lines, and with only the following information about his Senate service:

> He was elected United States Senator from Georgia to the first Congress, and served through President Adams' administration, until March 3, 1801, voting to locate the seat of government at Washington, D.C.[11]

On the other hand, these biographical encyclopedias are helpful in providing general information about the Senators' family background, profession, degree of wealth, ability, and character.

Various historical journals contain occasional bits of correspondence or other source material concerning the Senate during this period. Such journals also contain a number of helpful articles dealing with specialized phases of the work of the early Senate, such as Lane W. Lancaster's study of the initiative of the Senate in legislation.[12]

To the present writer's knowledge, no previous doctoral dissertation deals directly with the subject as defined in this study. However, a number touch upon various aspects of congressional activity during the period, such as E. G. McPherson's study of reporting the congressional debates and Frank F. Stephens' study of the transitional period between adoption of the Constitution and inauguration of the new Government.[13]

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[9] Edgar S. Maclay (ed.), *Journal of William Maclay* (New York: D. Appleton & Co., 1890), p. 185.

[10] Bibliographical information concerning these biographies is given under the appropriate heading in the bibliography at the end of this work.

[11] "James Gunn," *Natonal Cyclopedia of American Biography*, II, 11.

[12] Lane W. Lancaster, "The Initiative of the United States Senate in Legislation," *Southwestern Political and Social Science Quarterly*, IX (June 1928), 67–75.

As an aid to this study, George H. Haynes' *Senate of the United States*, in two volumes, is in a class by itself among the secondary works dealing with Congress. Professor Haynes describes the Senate as a living, present-day institution and his is not primarily a historical work in the chronological sense. However, he begins with a discussion of the Senate in the Constitutional Convention, describes the establishment of important precedents in the first session, and often throughout the study goes back to the Senate's first days in tracing development of its practices and traditions.[14]

Among the newspapers of the period, those published at the seat of the National Government give the most information concerning the activities of Congress, and were widely quoted elsewhere. However, even these give disappointingly few details about the work of the Senate, and such items as do appear are usually shaded, far from subtly, by the brush of the editor's political orientation. The present study has particularly utilized the *Gazette of the United States*, edited first by John Fenno and after 1798 by his son, John Ward Fenno; the *National Gazette*, edited by Philip Freneau; the *General Advertiser*, better known as the *Aurora*, edited first by Benjamin Franklin Bache, of whom the venerable Franklin was not proud to be a grandfather, and after 1798 by William Duane; and the *National Intelligencer*, edited by Samuel H. Smith. The first three of these newspapers were published at Philadelphia, the fourth at Washington, D.C. Since the Fennos, father and son, were not only stalwart Federalists but also official printers to the Senate, it is not surprising that they usually defended the Senate and its Federalist majority. On the other hand, Freneau, Bache, and Duane professed to believe that sinister forces were at work to make the Senate a hereditary House of Lords and heaped ridicule on it and its leadership. Duane so noisily impugned the conduct of the Senate's Federalist majority that he was hailed before the bar of the Senate for contempt. Smith had a higher regard for truth than the other Republican editors, but his Republican orientation must still be taken into account.[15]

On the whole, it is extremely difficult to locate the inner springs of Senate action during this period. Absence of recorded debates is the most obvious difficulty, but not the only one. Much of the strategy was mapped at conferences where no records were made. In their correspondence, Senators only infrequently revealed legislative maneuvers within the Senate walls. They often told their correspondents that they could learn about developments in Congress through the Capital newspapers. Perusal of these periodicals show that these friends could, indeed, read therein reports of House debates and often highly theoretical comments on congressional issues by correspondents with assorted Roman names, but seldom were the newswriters in position to open the Senate doors and reveal what transpired inside. In this study it has, therefore, been necessary, as in a jigsaw puzzle, to locate small pieces here and there and attempt to fit them together to form a portrait of the Senate in its youth.

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[13] Elizabeth Gregory McPherson, "The History of Reporting the Debates and Proceedings of Congress" (unpublished Ph.D. dissertation, Department of History and Government, University of North Carolina, 1940). Frank Fletcher Stephens, *Transitional Period, 1788–89, in the Government of the United States*, Ph.D. dissertation, University of Pennsylvania, revised and enlarged (Columbia, Mo.: E. W. Stephens Publishing Co., 1909).

[14] George H. Haynes, *Senate of the United States*, 2 vols. (Boston: Houghton-Mifflin Co., 1938).

[15] In these early years the term "Republican" was usually used to designate the party later known as the Democratic Party.

CHAPTER II

THE SENATE IN BLUEPRINT

COLONIAL AND STATE PRECEDENTS

When the Constitutional Fathers made the United States Senate one of the pillars of the new Government, they introduced no strange new principle to America's political soil. The Governor's council, charged with executive and judicial duties and forming the upper house of the legislature, had been an integral feature of most colonial, and later State, governments in America from their very early years. In fact, in one sense the council was the father of the entire colonial political establishment, since Virginia's first charter vested all the resident authority in a single council, which chose its own president. This government proving ineffective, a stronger executive was provided in 1609 and a popular assembly added a decade or so later.[1]

Members of the colonial councils were chosen by the Crown—generally, but not always, on the recommendation of the Governor. An exception was that of Massachusetts, where councilors were elected by the General Court, subject to a veto by the Governor. Among the qualities looked for in prospective councilors were conservatism and devotion to royal prerogative, in a deliberate attempt to make the council representative of the wealth of the colony and defender of the royal interest. Councilors received no salaries for their services beyond expense allowances, since the prestige attached to membership in His Majesty's Council was considered sufficient reward. On formal occasions, they were assigned the places of highest honor immediately below the Governor and Lieutenant Governor. They were also often rewarded with high administrative and judicial posts at the disposal of the Governor. Seniority (strangely prophetic of later Senate practice) was highly prized—not only for reasons of personal pride but because in the absence or death of the Governor and Lieutenant Governor, the administration descended on the senior councilor. In spite of some notable exceptions in the way of controversies between Governor and council, the council generally worked in harmony with the Governor and could be depended upon to endeavor to defend Crown and Governor against threats from the lower house.[2]

As previously mentioned, the colonial council served in a threefold capacity. First, it was an advisory council to the Governor, whose commission and instructions included lists of matters on which he could not act without the "advice and consent" of the council. In the later colonial period especially, this requirement included approval of appointments. As an executive board, the council was subject to the call of the Governor, who presided over its sessions, but he was instructed to allow the council full freedom of debate and vote.[3]

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[1] Everts Boutel Greene, *The Provincial Governor in the English Colonies of North America* (New York: Longmans, Green & Co., 1907), p. 23.

[2] *Ibid.*, pp. 72–78, 85–88; Leonard Woods Labaree, *Royal Government in America* ("Yale Historical Publications," IV [New Haven: Yale University Press, 1930]), pp. 145–146. 157–158.

In the second place, the council was the highest court of appeal in the colony in civil cases. It was here that the council reached its position of greatest independence, since the Governor acted only as a presiding "chief justice" and the council's authority was not shared by the popular assembly.[4]

In the third place, the council constituted the upper house of the colonial legislature and exercised an equal voice in most legislation. However, it never seriously pressed a claim to initiate money bills and only unsuccessfully attempted to amend them.[5]

On the whole, the colonial council was somewhat analogous to the British House of Lords, although it did not become hereditary. However, it did not achieve the strength of its prototype, subject as it was to appointment by higher authority. It should be remembered that at this time the House of Lords still had an equal voice in nonrevenue legislation in addition to authority arising from the wealth and social position of its members and its nonlegislative powers.

During the 18th century the colonial council's power tended to decline, squeezed as it was between the power of the Governor and the growing assertiveness of the assemblies backed by popular support. The council was further handicapped by the fact that its members, being colonials, were never fully trusted by His Majesty's government.[6]

The Revolution was, of course, directed against the very authority underlying His Majesty's councils and naturally the American victory eliminated these councils as appointed in the colonial period. However, the principle of the council was not expelled from American soil along with the British. The new State governments framed during and immediately after the Revolution followed in main outline their colonial predecessors. Almost all the State constitutions provided for upper legislative chambers, now emanating from the people through some method of direct or indirect election, but designed to represent the propertied elements through property qualifications on the part of members or their electors higher than those required in election of members of the lower chambers. Even the States which tried the unicameral system (Georgia, Pennsylvania, Vermont) did not eliminate councils, but made them executive rather than legislative bodies, while some States with bicameral systems provided an additional council to share the executive power.[7]

The delegates to the Philadelphia convention could not have duplicated either the British or State legislative models in the Federal Constitution even if they desired, because in shaping the Federal Legislature they faced the additional vital problem of distributing powers between the National and State Governments. The powers of the Senate were assigned with one eye always open to this distribution. However, the very fact that both the Pinckney and Randolph plans, and Hamilton's amendments to the latter, all called for bicameral legislatures, shows the strong influence of the British and colonial precedents for the bicameral system. It must be borne in mind that the men who framed the Constitution had lived the major part of their lives under the authority of governments of which the House of Lords and the Governor's council were integral parts, and they could not help but be influenced, positively or negatively, by experience with those bodies.

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[3] Greene, *op. cit.*, pp. 79–82.
[4] Labaree, *op. cit.*, pp. 407 ff.
[5] *Ibid.*, p. 135.
[6] *Ibid.*, pp. 167–171.
[7] Allan Nevins, *The American States During and After the Revolution*, 1775–1789 (New York: The Macmillan Co., 1927), *passim*.

On the floor of the Constitutional Convention and in the ratification struggle, the Senate of Maryland, especially, was used as an example of what to expect from the U.S. Senate. That State's upper house was elected indirectly by the people at large for terms of 5 years. Although empowered to fill its own vacancies within its term of election, it had not become dangerously powerful as some had feared but had earned a reputation probably unrivaled by the upper house of any other State.[8] On the other hand, the Senates of Rhode Island and other States that were constituted on "too democratic principles" were offered as examples of what to avoid in establishing the U.S. Senate.[9]

The delegates to the Federal and State conventions were not, however, reluctant to use examples from scenes more distant than those of Westminster and Annapolis. The debates show frequent appeals to the experience of other governments—ancient, medieval, and modern—from the Amphictyonic Confederation to that of contemporary Germany.

The Senate in the Constitutional Convention

DEFENDER OF PROPERTY

Delegates to the Constitutional Convention came to Philadelphia that momentous May in 1787 with the most contradictory hopes and fears for the future of their country. Some hoped for a new central government just strong enough to overcome the worst weaknesses of the Articles of Confederation, and above all feared tyranny, aristocracy, and monarchy. Others hoped for a powerful, energetic system under which the States would play a decidedly secondary role, and above all feared disorder and political frustration. From these contradictory hopes and fears was fashioned the new Constitution, which in turn gave rise to new hopes and fears equally contradictory. One of the aims of this study is to define these opposing anticipations as they related to the Senate, and to show how they fared under the first 12 years of the new Government.[10]

One of the fears most conspicuously expressed at the Philadelphia convention was that of "too much democracy." Many delegates believed that too direct a control of government by the great mass of people inevitably brought tumult, impetuous action, and weird financial schemes that would ruin the stable, propertied classes and disorder society. Most of the delegates believed that a brake was needed to restrain the passions and impulses of the multitude. Their experience pointed to an upper legislative chamber—further removed from the people than the popular assembly, with strong independent powers, and with longer terms—as the most effective agency to accomplish this end. The Randolph (or Virginia) plan, the Pinckney plan, and Hamilton's proposed amendments to the former all called for such an upper house. Edmund Randolph, after presenting the plan which served as the basis of discussion when the Convention opened, bluntly explained that the purpose of the upper house should be to check the "turbulence and follies of democracy" which were the origin of the evils under which America labored.[11]

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[8] James Madison or Alexander Hamilton, "The Federalist No. 63," *The Federalist* (Modern Library ed.; New York; Random House, 1937), pp. 414–415.

[9] Alexander Hamilton in the New York convention; see Jonathan Elliot (ed.), *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (2d ed.; Philadelphia: J. B. Lippincott & Co., 1888), II, 317. This work is hereafter referred to as *Elliot's Debates*.

[10] No attempt is made here to discuss the full scope of the developments at Philadelphia affecting the Senate, since they have been adequately covered in a number of secondary works dealing with the Convention. The present aim is to discuss the arguments and final decisions of the framers on questions which were of vital moment in the experience of the Senate during its first 12 years, with the view of later showing how the anticipations of 1787 were verified or disappointed.

The debate concerning the Senate in the Convention is well summarized by Haynes, *op. cit.*, in his 1st chapter, which is entitled "Planning the Senate in the Federal Convention," pp. 3–38.

James Wilson, with a faith in democracy far ahead of his time, almost, if not entirely, alone championed a Senate flowing directly from the people.[12] Most of the other delegates were divided merely on the question of the particular means by which the Senate could best be made to represent the wealthy, conservative interest.

At the extreme right was a group of men who looked to the British House of Lords as the best possible model. Although they recognized that the peculiar genius of the American people opposed any exact duplication, they hoped that some of its distinctive features could be adapted to fit the American picture.

Alexander Hamilton believed that Senators should be chosen indirectly by electors chosen for that purpose, and that they should serve during good behavior.[13] Gouverneur Morris agreed that appointments must be for life to make the Senate independent and firm, but believed appointments should be made by the President. In the latter's judgment, the Senate "must have great personal property; it must have the aristocratic spirit; it must love to lord it through pride." He then added a peculiar twist: Since the rich will always strive to dominate and enslave the rest, the people will best be protected against them by forming them into "a separate interest" to be represented by the Senate—thus placing them in a sort of senatorial quarantine.

> Let the rich mix with the poor, and in a commercial country they will establish an oligarchy. * * * By thus combining, and setting apart, the aristocratic interests, the popular interest will be combined against it. There will be a mutual check and mutual security.[14]

Thirteen years later, this champion of the purple hem himself donned the senatorial toga. But by that time he had learned a great deal more about what the American people looked for in an upper chamber.

John Dickinson of Delaware maintained that the Senate should consist of members "distinguished for their rank in life and their weight of property" and was quite frank in asserting that the Senate should bear as strong a likeness to the British House of Lords as possible. However, he believed that election by State legislatures was the best method of obtaining such men for the Senate.[15] Two future Senators, George Read of Delaware and Robert Morris of Pennsylvania, formally proposed that Senators hold office during good behavior. However, this extremely conservative element, although able and articulate, constituted only a minority in the Convention and the proposal did not come to a vote.[16]

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[11] Prescott, *op. cit.*, pp. 48–49, 76–77, 238–239; Max Farrand, *Records of the Federal Convention of 1787* (New Haven; Yale University Press, 1911–27), III, 605.

[12] Prescott, *op. cit.*, pp. 241, 256.

[13] *Ibid.*, pp. 77–78.

[14] *Ibid.*, pp. 317–319. John Adams later expressed a similar opinion in his *Defense of the Constitutions of Government of the United States of America* [1787–88] I, shown in Charles Francis Adams (ed.), *Works of John Adams with a Life of the Author* (Boston: Little, Brown & Co., 1850–56), IV, 290–291. The Adams papers are hereafter referred to as Adams *Works*.

In view of charges later made repeatedly by the Republicans, particularly in the 1792 and 1796 campaigns, it is significant to note that no proposal for a *hereditary* Senate was submitted at the convention even by the arch-conservatives.

Although the great majority of the delegates would not go along with the idea of a Senator for life, even those more closely in tune with the temper of the convention believed that the Senate should represent wealth and check the impetuosity of the popular will. Randolph wanted the Senate to check "democratic licentiousness" and wanted as firm a body as possible so that it would not be overwhelmed by the popularly elected House or by a combination between the President and the demogogues of that body. Elbridge Gerry of Massachusetts believed the Senate ought to represent the commercial and moneyed interest as a check against the agricultural interest which he believed would dominate the lower House. Abraham Baldwin, later a Republican Senator from Georgia, stated that the Senate ought to be "the representation of property."[17]

Even James Madison, who in just a few years was to become a powerful congressional critic of the conservative, moneyed interest as represented by Hamilton and the Federalist Party, believed that the Senate ought to be a rampart of the haves against the have-nots. He foresaw a future time when "those who labor under all the hardships of life" would "secretly sigh for a more equal distribution of its blessings." When they outnumbered the well-to-do, this new majority would endanger the more wealthy minority, which would need a vigorous voice in the government to defend itself.

> No agrarian attempts have yet been made in this country; but symptoms of a levelling spirit, as we have understood, have sufficiently appeared in a certain quarter to give notice of the future danger. How is this danger to be guarded against on the republican principles? How is the danger, in all cases of interested coalitions to oppress the minority, to be guarded against? Among other means, by the establishment of a body in the government, sufficiently respectable for its wisdom and virtue to aid, on such emergencies, the preponderance of justice, by throwing its weight into that scale.[18]

It will be observed that of the men quoted only Gerry anticipated that in the period immediately following, the essential political conflict would be between the commercial and financial interests on the one side and the agricultural interests on the other.

A COUNCIL TO REVISE HOUSE MEASURES

Hardly distinguishable from this idea of the Senate as the special spokesman for property was the prevalent belief that a Senate, as a body of elders with greater experience, wisdom, and detachment, was needed to review and revise the work of the House of Representatives, which, as a popularly-elected body, was likely to reflect the passions and political incapacity of the populace.

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[15] Prescott, *op. cit.*, p. 240.
[16] *Ibid.*, p. 258.
[17] *Ibid.*, pp. 242, 244, 246, 304.
[18] *Ibid.*, p. 261.

For instance, Gouverneur Morris stated that the object of the Senate should be to "check the precipitation, changeableness, and excesses of the first branch"; Ellsworth, that "*wisdom*" was one of the characteristics particularly sought in the second branch; Randolph, that "wisdom and stability" were the objects sought (apparently assuming that these would be lacking in the House of Representatives); Madison, that the Senate should have the twofold purpose of protecting the people against their rulers and also against the transient impressions into which they themselves might be led.[19]

Delegates suggested a number of different methods of securing for the Senate this superior wisdom and detachment. As already noted, the arch-conservatives sought to promote these qualities through appointments for life. Some of them, such as George Read and Gouverneur Morris, added that the President would be best able to name such persons to the office, while Hamilton suggested indirect election through electors chosen especially for that purpose. The Randolph plan proposed indirect election through the lower House from among nominees suggested by the State legislatures as an effective method of filtering the popular choice. Among the arguments for the method finally agreed upon—election by the State legislatures—was the claim that the legislatures would be more likely than the people themselves to choose conservative men of character and distinguished talents.[20]

Another method of assuring to the Senate men of greater wisdom and stability was that of giving Senators longer terms than House Members. Terms of 3, 4, 5, 6, 7, and 9 years, and life appointments were suggested. Shorter terms were advocated on the plea that they would provide earlier opportunity for getting rid of unsatisfactory Members, that Senators would not lose their attachment to their home States, and that long terms were politically inexpedient since the people probably would not ratify a Constitution providing for them. Longer terms, on the other hand, were supported in the belief that they would give the Senate more firmness in resisting the popular torrent which might sway House and President, and would contribute to the stability so eagerly sought by most of the delegates. Even James Wilson supported a 9-year term, believing that, since the Senate would control foreign affairs, a long term would promote confidence abroad. A 7-year term was at one time accepted, but was later reduced to 6 years, apparently to facilitate rotation.[21]

A minimum age of 30 years—5 years more than that required of House Members—was unanimously agreed to after little debate.[22] However, most of the delegates appear to have anticipated that Senators would generally be far older than the prescribed minimum.

The question of a minimum period of citizenship as a requirement for election to the Senate provoked a more vigorous controversy. Four years was at first suggested, but was objected to chiefly on the ground that the Senate's control over foreign relations would make in-advisable admission of recent immigrants presumably swayed by attachments to their mother countries. At the opposite extreme, Gouverneur Morris' suggestion of 14 years was criticized as "illiberal," especially in view of the contributions of foreigners during the Revolution. Finally 9 years of citizenship was approved as a reasonable compromise, 2 years more than the period required of House Members.[23]

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[19] *Ibid.*, pp. 256, 258–260, 317.
[20] *Ibid.*, pp. 240–242, 244, 256, 319.
[21] *Ibid.*, pp. 246–247, 258–259, 261–262, 264–265.
[22] *Ibid.*, p. 267.

Also emphasizing the Senate's role as a reviewing and revising body (rather than as a coequal legislative body), was the decision to give to the lower House alone the power to originate revenue legislation while giving the Senate full power to amend. Some delegates believed that this would make a very important difference in the powers of the two Houses.[24] As finally adopted, the clause fell far short of the original proposal—that all bills for raising and appropriating money and fixing Federal salaries must not only originate in the lower House but could not be altered by the Senate. In deciding this question, the convention was not moved primarily by the revisory-council idea but by a desire to compensate the larger States for the small States' equal representation in the Senate and by the conviction that the immediate representatives of the people should have the first voice in revenue matters.[25] No doubt the delegates had in mind the precedents of the British Parliament and the State legislatures.

Thus, principally by the "filtering" process of indirect election through the State legislatures, by the comparatively long term of 6 years, and by a higher age requirement, the fathers of the Constitution attempted to assure to the Senate a class of men whose greater judgment, experience, and independence would check the impetuosity of the lower House and introduce greater wisdom into the National Legislature. These means of obtaining objects so earnestly sought after seem, in retrospect, comparatively modest. However, the delegates constantly labored under the necessity of producing a frame of government that they not only considered wise and effective, but also one that would have sufficient popular appeal to be ratified by the States.

AN ADVISORY COUNCIL TO THE PRESIDENT

The idea of a council to aid and check the Executive was so firmly fixed in the minds of these heirs of British and American political practice that one member was led to remark that it would be "a singular thing if the measures of the Executive were not to undergo some previous discussion before the President." [26]

During the course of the convention, various delegates repeatedly urged establishment of a council to the President. In fact, some favored putting all the Executive power in the hands of a council rather than a single individual, regarding "unity in the executive magistracy" as the "foetus of monarchy." [27] Such an executive council was a feature of the New Jersey plan. Many of the leaders of the Convention warmly supported a provision for a "council of revision" composed of the President and a "convenient number of the national judiciary," with power to veto legislation passed by Congress. This was a feature of the Virginia plan.[28]

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[23] *Ibid.*, pp. 267-272.

[24] *Ibid.*, pp. 372, 375, 392-393, 440. However, other delegates anticipated that the provision would make very little difference. See *ibid.*, pp. 322, 324, 392.

[25] *Ibid.*, pp. 438-439.

[26] John Dickinson of Delaware; see *ibid.*, p. 640.

[27] Edmund Randolph of Virginia; see *ibid.*, p. 544.

As precious time went by and the Convention had not yet provided a council for the President, Ellsworth proposed one composed of the President of the Senate, the Chief Justice, and the heads of the executive departments, which should have the duty of advising, but not of controlling, the President. George Mason advocated a "privy council" of six members chosen by the Senate for 6 years to share with the President the power to make appointments.[29]

Most of the sentiment for a council to the President was based on the conviction that giving to the President alone all the executive power—particularly the power to make treaties and appointments—would lead to tyranny. The need of the President for *advice*, in the strict sense, was generally considered an important, but secondary, factor.

As time passed by and proposals for councils were dropped one by one, it became apparent that the desired restraint and advice could be provided by the Senate. At first there had been some support for a large upper House—"80, and twice 80," members, to use Dickinson's extravagant suggestion—in the belief that size of membership would aid the Senate in counterbalancing the lower House. Such a large body would have been considered unsuitable as a council. However, when it was decided that the Senate was to have but two Members from each State, the Convention had before it a readymade council, of a size about equal to that of the colonial council of Massachusetts and presumably small enough to keep State secrets.[30]

There was considerable support in the Convention for appointment of Federal officials, particularly judges, by the Senate or by Congress as a whole. The report of the committee of detail submitted August 6 provided that the Senate, rather than the President, should actually make treaties and appoint ambassadors and Supreme Court judges. The question of whether the President or the Senate should be assigned these powers was vigorously debated by the convention, which finally decided that responsibility on the one hand and security against tyranny on the other could best be obtained by giving the President the initiative in making appointments, subject to Senate confirmation, and giving the President, with the advice and consent of two-thirds of the Senators present, power to make treaties.[31] It will be noted that the President's exclusive initiative is more clearly specified in the finally adopted phrase affecting appointments than in the provision for making treaties.[32]

Some of the delegates anticipated that the Senate, because of these executive duties, would sit the year around as a council to the President, and would thus be as much a part of the Executive as of the legislative establishment.[33] Those who were charged with the responsibility of first putting the Constitution into effect tried to act in accordance with that conception—with results which will be noted in a later chapter.

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[28] *Ibid.*, pp. 53, 549–551, 597–598.

[29] *Ibid.*, pp. 613, 638–639.

[30] *Ibid.*, pp. 240, 243.

[31] *Ibid.*, pp. 453–465, 669. The debates which resulted in the final compromise on this question are outlined by Joseph P. Harris in *Advice and Consent of the Senate* (Berkeley: University of California Press, 1953), ch. II, "Debates on the Appointing Power in the Constitutional Convention," pp. 17–35.

James Wilson of Pennsylvania, ever on the alert to keep the Government close to the people, moved to give the House of Representatives a share in the treatymaking power. However, his motion received the support of his own State only.

[32] "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers, etc." Constitution, art. 2, sec. 2.

The Senate was thus made a council to the President—not by first designating it a council and then assigning it a council's duties, but by first assigning it "advice-and-consent" duties which gave it something of the nature of an executive council. The analogy between the Senate and the colonial council was inexact but clear, both serving in the threefold capacity of legislative chamber, judicial court (the Senate being made the court in impeachment cases), and council of advice to the Executive.[34]

REPRESENTATIVE OF THE STATES

The previously discussed convention issues affecting the Senate, important as they were, were definitely secondary to the question of whether the American people should be proportionately represented in the Senate or whether each State, large or small, should have equal representation. Here, disagreement was so violent that it threatened to break up the Convention and led the aged Benjamin Franklin to suggest the "desperate" remedy of prayer.[35] Nearly all of the issues involving the powers and composition of Congress were vitally affected in one way or another by this great central issue.

Election by State legislatures rather than by one of the other proposed methods was generally accepted as a logical corollary of the idea that the Senate should represent the State governments *as such*, which was the basic premise of those who sought equal State representation in the Senate. As Dickinson said, "* * * the sense of the States would be better collected through their governments than immediately from the people at large." [36] It was also believed that election by legislatures would give the State governments an interest in supporting the National Government and thus promote harmony between them.[37] With each Senator owing his election to the legislature of his State, it was certainly natural to expect a certain feeling of kinship between the legislature and the Senate.

The same controversy underlay the distribution of Federal powers among President, Senate, and House of Representatives—indeed, what powers were to be granted to the Federal Government at all. It was a moot question in the Convention which should come first—determining the basis of representation or assigning the various powers. Madison observed that "it would be impossible to say what powers could be safely and properly vested in the Government before it was known in what manner the States were to be represented in it." Randolph confessed himself greatly embarrassed by the decision to give all States equal representation in the Senate, since assignment of powers in the Virginia plan was based on proportional representation in both Houses.[38]

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[33] For examples of such an expectation, see Prescott, *op. cit.*, pp. 258, 439, 639.

[34] The question of giving the President *advice*, in the more restricted sense of counsel he was at liberty either to accept or reject, was further solved by giving him power to require of the heads of the executive departments written opinions concerning subjects relating to their offices, a curiously superfluous provision in view of the fact that the President was made head of the entire executive branch of the Government. With the treaty and appointing powers of the President checked by the Senate, it was considered safe to grant him a limited veto power.

[35] Farrand, *op. cit.*, I, 450–452.

[36] Prescott, *op. cit.*, p. 240.

[37] Roger Sherman of Connecticut; see *ibid.*

In connection with the treaty power, Ellsworth, who made the motion for equal representation in the Senate, insisted that such equality was necessary to protect the smaller States from unfair combinations of larger States which might try to obtain treaties for their own commercial advantage—for instance, confinement of "free ports" to Boston, Philadelphia, and some port on Chesapeake Bay.[39] William R. Davie of North Carolina, himself a member of the Federal Convention, stated in the ratifying convention of his State that at Philadelphia the extreme jealousy of the small States and between commercial and nonimporting States "made it indispensable to give to the Senators, as representatives of States, the power of making, or rather ratifying, treaties," adding that "the small States would not consent to confederate without an equal voice in the formation of treaties * * *."[40]

Commenting on this decision in 1796, a member of the Philadelphia Convention stated that—

> * * * we preserved an equality of representation for the state governments in the Senate (the only federal feature in the constitution,) and consequently there we meant to deposit as many as possible of the great portions of sovereignty the states were obliged to delegate, and among others, the Treaty-making power.[41]

President Washington in the same year stated that it was "well known" that powers such as the treaty power were granted to the Senate on the insistence of the smaller States, which claimed that their sovereignty and political safety depended on equal participation in those powers.[42]

When the small States won their point here, Madison voiced the interests of the large States when he supported presidential control over certain types of treaties, claiming that the Senate represented the States alone. Gouverneur Morris of the large State of New York unsuccessfully tried to give the House of Representatives, with its larger delegations from the larger States, an agency in treaty making by requiring that treaties be ratified by law.[43]

The issue of equal versus proportional representation in the Senate was also involved in the question of the Senate's power to confirm or reject presidential appointments. The small States were apprehensive that proportional representation combined with Senate power over appointments would lead to control of the entire Federal administrative machinery by the large States. Ellsworth feared combinations of large States to control that machinery similar to those he feared in connection with the treaty power. Randolph, although representing the most populous State, agreed that both were possible, and proposed a compromise, accepting the proportional principle but giving the small States more than their mathematical proportion of Senators.

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[38] *Ibid.*, pp. 335, 380.

[39] *Ibid.*, p. 307.

[40] *Elliot's Debates*, IV, 120.

[41] Letter dated Apr. 3, 1796, from an unnamed gentleman in Baltimore who was a member of the Constitutional Convention to a friend in Philadelphia, *Gazette of the United States*, Apr. 14, 1796.

[42] Reply dated Mar. 30, 1796, to the demand of the House for papers relating to the Jay Treaty, James D. Richardson (ed.), *A Compilation of the Messages and Papers of the Presidents* (New York: Bureau of National Literature, Inc., 1911-17), I, 188.

[43] Prescott, *op. cit.*, pp. 458-459.

> The small States would not agree that the House of Representatives should have a voice in the appointment to offices; and the extreme jealousy of all the States would not give it to the President alone—

Davie succinctly observed.[44]

As previously mentioned, the constitutional provision giving the House of Representatives sole power to originate revenue legislation was inserted partly to compensate the larger States for their great concession in giving the smaller States equal representation in the Senate, although many delegates representing the former did not consider this much of a concession, especially after a provision preventing the Senate from even amending revenue bills was dropped.

Equal representation in the Senate was an important consideration even in the debate on making the Senate the court of impeachment. Wilson and Madison both objected to giving the small States equal agency with the large in this respect, which would enable a minority of the people to prevent removal of an officer who had proved himself unworthy of his trust.[45]

Delegates from the larger States accepted equal representation in the Senate only after vigorous, and often bitter, protests. Their most telling argument, of course, was the injustice of giving tiny Rhode Island or Delaware a voice and vote in the Senate equal to populous Virginia and Pennsylvania, which would enable a minority of one-third of the people to rule the other two-thirds. Some delegates saw in equal representation in the Senate a perpetuation of the Congress of the Confederation with all its weaknesses and a futile purchase of harmony in the Convention on terms that would perpetuate discord among their constituents. King of New York, Wilson of Pennsylvania, and Madison of Virginia earnestly appealed to their colleagues from the smaller States not to insist on a basis of representation which was foredoomed to failure. Acceptance of this principle would be sacrificing the substantial good of individual justice for the "phantom of *State* sovereignty," said King, adding that his "feelings were more harrowed and his fears more agitated for his country than he could express." Wilson constantly hammered at the idea that the delegates were gathered to form a government for *men*, not imaginary beings called *States*. Gouverneur Morris feared that the intransigence of the small States would lead to anarchy and the country would have to be united by the sword.[46]

Against these eloquent pleas the supporters of equal representation in the Senate were adamant. They insisted that that basis was absolutely essential to the very existence of the small States and appealed to the faith pledged by the larger States with so much solemnity when the Federal compact was first entered into. It was in this connection that Gunning Bedford of Delaware made his famous statement that rejection of equal representation for the small States would lead them to find "some foreign ally, of more honor and good faith, who will take them by the hand, and do them justice." [47]

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[44] *Elliot's Debates*, IV, 122.
[45] Prescott, *op. cit.*, p. 767.
[46] *Ibid.*, pp. 305, 310, 312-313, 322-325, 375, 377.
[47] *Ibid.*, pp. 314-315.

Throughout this struggle, equal representation in the Senate was demanded on the plea that it was absolutely essential to defend the States as political entities. Thus Senators were pictured as representing not primarily the people, but the States as such. Roger Sherman put the case concisely when he urged—

> equality of votes, not so much as a security for the small States as for the State *governments*, which could not be preserved unless they were represented, and had a negative in the general government.[48]

Wilson argued in vain that the large States were just as attached to the existence of the State governments as were the small ones.[49] Opponents of equal representation finally realized that they faced the choice of equal representation or no Constitution.

This part of the debate has been recounted at some length in order to emphasize the fact that acceptance of equal representation in the Senate (and its corollary, election of Senators by the State legislatures) involved recognition of the idea that the Senators were to represent the States as such—that they would come to the National Capital as ambassadors of their States. How this principle fared during the first few years of government under the Constitution will be discussed in a later chapter.

The full strength of this concept, however, was diluted at the Convention itself by three contradictory provisions. In the first place, Senators were to vote "per capita" rather than by State, which would make it easily possible for a State to split its vote and thus frustrate completely the idea that the two Senators from a given State were in the Senate to represent the viewpoint of their State. Ellsworth, stalwart champion of equal representation though he was, stated that he "always approved of voting in that mode." Luther Martin of Maryland saw that voting "per capita" was a departure from the idea of State-government representation in the Senate, but his State was the only one to vote against that method of voting.[50] Since it had been decided that there were to be two Senators from each State (three being considered too expensive or too many and one making for too small a body), there was little else the framers could do if they were to avoid a frequent, unfortunate occurrence in the existing Congress—inability of a State to vote at all because of an equal division within its delegation.

Secondly, Senators were to be paid, not by the State governments they were to represent, but by the Federal Government. In the debate on this point, the opponents of equal representation and of the whole idea that Senators were to represent State sovereignty saw clearly that compensation by the States would indeed make the Senators agents of the States rather than of the Federal Government, agreeing with the scriptural observation that "where your treasure is, there will your heart be also." The proponents of equal representation, on the other hand, were divided on the point. Payment by

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[48] *Ibid.*, p. 373. Italic are the present writer's.

[49] *Ibid.*, p. 378.

[50] *Ibid.*, pp. 384–385. C. C. Pinckney of South Carolina, a member of the Philadelphia Convention, stated in his State's ratifying convention that one of the reasons for the "per capita" method of voting was an effort to promote full representation in the Senate and was approved by all who had been members of the "old" Congress and who thus knew of the difficulties absenteeism had caused that body under the system of voting by State delegation. See Elliot's Debates, IV, p. 267. (The problem of achieving a quorum, already a difficult one, became acute when some States could not cast their votes because of splits within their delegations.

States at one time had the support of five States to six for payment by the Federal Government, but finally even Ellsworth, who had earlier moved to substitute payment by the States for payment out of the National Treasury, came around to the view that the former method would produce too much dependence on the State governments. Payment out of the Federal Treasury was finally adopted, nine States to two.[51]

In the third place, the convention did not give the State legislatures power to recall Senators once elected. This was an important omission. Election for the comparatively long term of 6 years without possibility of recall made Senators, as proponents of the term intended, relatively independent of the legislatures, the personnel of which would in all likelihood be considerably altered before a Senator would come up for reelection. The significance of inability to recall was very early brought home to members of the North Carolina legislature, as a later chapter will describe.

The concept of the Senate as a "council of States" was rejected by many members of the convention, who continued to insist that Senators should give full allegiance to the whole Nation rather than share it with their respective States. They gravely feared that acceptance of the concept would make the new Congress, like the old, likely to run aground on the rock of State intransigence. In fact, equal representation in the Senate was finally accepted by the narrowest of votes, five States to four. The five supporting States not only were a minority of the total States represented at the convention but—since they included small States like Delaware but not the large States of Virginia and Pennsylvania--represented an even smaller minority of the people of the United States.[52]

However, the very fact that the convention was forced to acquiesce in equal representation of the States in the Senate did give definite credence to the theory that the upper house would, indeed, be such a "council of States," peculiarly answerable to the will of the legislatures and responsible for protection of the States as political entities. It gained even wider currency in the struggle over ratifications, for reasons which will be shown. The concept was used by both Federalists and Republicans in the bitter political struggles of the 1790's when it suited their purposes.[53]

THE SENATE IN THE RATIFICATION CAMPAIGN

In the ratifying conventions and the attendant press and pamphlet warfare, the U.S. Senate as outlined in the Constitution was subjected to minute scrutiny. It was forcefully defended by men who saw in it a source of stability, legislative wisdom, and defense against tyranny. It was just as vigorously denounced by suspicious gentlemen who saw in the upper house a prospective dwelling-place for a small group of power-hungry patricians, who, in lofty isolation from the people, would sell the dearest rights of their fellow-citizens for foreign or domestic gold.

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[51] Prescott, op. cit., pp. 411–420.

[52] For expressions of the fear that the composition of the Senate would make the new Congress another Congress of the Confederation, see *ibid.*, pp. 310, 325, 326.

[53] The provision in art. I, sec. 4, par. 1, of the Constitution providing that Congress may not make any regulations as to the place of electing Senators also reflected an unwillingness to allow any interference with full exercise by the legislatures of their rights with respect to the election of Senators.

DEFENDER OF STATE SOVEREIGNTY

The question which most agitated the Philadelphia convention—equal versus proportional representation in the Senate—provoked comparatively little controversy in the State conventions, even in the larger States. This is not to say that equality in the Senate was not at all denounced. In the Massachusetts convention, a Maj. Samuel Nason decried this feature of the Constitution on the ground that it would give an equal voice to tiny States which would pay only a fraction as much in Federal taxes as Massachusetts.[54] In Virginia, Patrick Henry identified equality of votes for Rhode Island and Delaware with the "rotten borough" system of England and the concept of "virtual representation" advanced by Great Britain and scorned by the colonies in the pre-Revolutionary controversy with the mother country.[55] But even these critics did not make equality of States in the Senate the cornerstone of their argument.

The reasons for this dearth of opposition in the State conventions to the provision which almost broke up the Federal convention are not hard to find.

In the first place, equal representation in the Senate, combined with proportional representation in the House, amounted to a strong middle position between State particularism and a truly national government. Their experience at Philadelphia had convinced the supporters of an effective central government that that—together with the great powers given the President—was all they could possibly obtain. And this was to them a substantial improvement over the Articles of Confederation, under which all the national power was held by a Congress in which all States, large and small, were equally represented. On the other hand, those who feared for the sovereignty of the States realized that they had secured a reasonable compromise in equal representation in the Senate. The small State of Delaware was the first to ratify the Constitution, and its ratification was by unanimous vote, as was that of New Jersey and of Georgia.

In the second place, leaders in the struggle at Philadelphia for proportional representation in the Senate—men like Rufus King of Massachusetts, James Wilson of Pennsylvania, and James Madison of Virginia—loyally accepted the will of the Federal convention and energetically defended its compromise in their home States.

In the third place, opponents of equal representation in the Senate had to recognize the plain fact that the small States just would not accept any other basis of Senate representation, and they accordingly diverted their attacks from equal representation as such to what they considered the excessive powers granted that body. Opposition to the powers granted the Senate, based on this and other reasons, is discussed below. It is probable that much of the opposition to Senate powers, although ostensibly based on fear of Senate tyranny and corruption, was at heart based on opposition to equal representation of the small States.

In the fourth place, the elements in the State conventions which were most bitterly opposed to the Constitution generally based their arguments on the claim that it created a consolidated, rather than a Federal Government (using the word "federal" in its true sense).

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[54] *Elliot's Debates*, II, 135.

[55] Ibid., III, 324, 329.

They pointed out that the delegates had been sent to Philadelphia to strengthen, not destroy, the existing government under the Articles of Confederation. Such critics found it quite awkward to attack the one feature of the new system which retained the central idea of the Confederation—equality of the States. Defenders of the Constitution were quick to take advantage of their opponents' dilemma, and, in their efforts to dissipate the doubts of those who feared for the sovereignty of their States, seldom missed an opportunity to clothe the future Senators in the full dress of ambassadors sent by the States to defend their sovereignty against the national orientation of President and House of Representatives.[56] Even future Federalist stalwarts like Rufus King and John Jay argued that State legislatures would be able to maintain their States' interests by *instructing* their Senators as to how to conduct themselves in Congress.[57]

However, critics of the Constitution, particularly in the critical States of New York and Massachusetts, threw the dilemma back to its supporters. At Boston, a Dr. Taylor insisted on annual elections and recall of Senators by the State legislatures as under the Articles of Confederation.[58] At Poughkeepsie, Gilbert Livingston proposed an amendment to the Constitution which would render Senators ineligible to serve more than 6 years in any period of 12 years and giving the legislatures power to recall Senators without limit as to cause. This proposed amendment occasioned some of the most vigorous debate in the New York convention before it was finally adopted as one of the amendments for which New York's representatives in Congress were solemnly enjoined to exert all their influence. When Rhode Island finally ratified 2 years later, she also appended a proposed amendment providing for recall. In addition, the widely heralded Harrisburg meeting following the Pennsylvania convention recommended an amendment providing for recall of Senators "at any time" by the legislatures which elected them.[59]

Proponents of recall by State legislatures reasoned that since the Senate was designed to serve as a bulwark to the independence of the States and a check on the encroachments of the Federal Government, its Members ought to be peculiarly under the legislatures' control. Power to recall a Senator who refused or neglected to comply with the legislatures' wishes does seem to be a natural concomitance of this theory. Supporters of the power of recall complained that friends of the Constitution were inclined to use the concept of the Senate as representative of State sovereignty when it suited their purpose, and when it did not, to ignore it or to imply that attachment to State interests was an evil.[60]

This criticism was, indeed, justified, and involved a basic contradiction not only in the arguments of the Constitution's defenders, but in the very nature of the Senate itself as contemplated by the Constitution. Equal representation coupled with election by the State legislatures would make the Senate the guardian of State sovereignty; long terms without possibility of recall tended to remove Senators from too close dependence on State interests and make them more "Nation-minded." This contradiction is quite evident in *The Federalist.* In No. 62, Madison or Hamilton (the authorship is disputed) stated that the Senate represented the portion of sovereignty remaining to the States, while in No. 63 the writer approvingly anticipated the Senators' stronger "sense of national character" compared to House Members, due to the former's longer terms and less close ties with their constituents.

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[56] *Elliot's Debates*: Pennsylvania: II, 438–439, 476 (Wilson); Massachusetts: II, 47 (King), II, 46 (Ames), II, 64 (Sumner), II, 145 (Thacher); New York: II, 303–304 (Hamilton), II, 291 (R. R. Livingston); North Carolina: IV, 119–124 (Davie); IV, 38–40 (Iredell); Virginia: III, 96–97 (Madison).

[57] *Ibid.*, II, 47, 283.

[58] *Ibid.*, II, 5.

[59] *Ibid.*, I, 330, 337: II, 286–325; *Pennsylvania Gazette*, Sept. 17, 1788.

[60] *Elliot's Debates*, II, 289–291, 294, 312.

The exigencies of the situation in New York forced the defenders of the Constitution to take an equivocal stand with respect to the Senate as the special spokesman for State sovereignty. Hamilton and Robert R. Livingston professed to hold fast the theory that the Senators would represent the States as such, but at the same time contended that they would represent the whole Union. Senators would be "unbiased by *false* conceptions of the States' *real* interests or *undue* attachment to the *apparent* good of their several States," and would be willing to make small apparent sacrifices of State interest for the overall good of the whole.[61] Hamilton and Livingston also argued that power of recall would rob the Senate of its stability by making it subject to momentary majorities in the State legislatures. Here they were on strong enough ground. However, they probably weakened their case in the eyes of their colleagues, many of whom had been closely identified with the State or colonial legislature, when they went on to attack the recall amendment on the ground that it would make the Senate too much like State legislatures, which in turn shared the "factious and irregular passions, prejudices, and misapprehensions" of the multitudes. Hamilton softened his attack somewhat by remarking that New York, because of its stable senate, had a better legislature than most States, and emphasized that Senators would never be so insensible of their own advantage that they would sacrifice the genuine interests of their constituents. He assured his colleagues that the United States Senate would maintain as firm an attachment to the State as to the National Government.[62]

Men like Hamilton and Robert R. Livingston obviously had two objects in view—to prevent the Senate from being too closely controlled by either people or legislature, and at the same time to utilize the vote-getting appeal of the "defender of State sovereignty" concept.

Such tactics were also employed by defenders of the Constitution in pamphlet and newspaper warfare. In Pennsylvania, a large State which would be underrepresented in the Senate, Noah Webster minimized the "representative of State sovereignty" idea and anticipated that Senators, due to their long terms, would gradually lose their partiality for their own States and would consider themselves as acting for the Nation.[63] On the other hand, in Delaware, where some feared their small State would lose its identity under the proposed Constitution, John Dickinson emphasized that the Senate would represent the "sovereignties of the several States" in the same manner as they were represented under the Articles of Confederation.[64]

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[61] *Ibid.*, II, 289–290, 303–304. (The italics are the present writer's.

[62] *Ibid.*, II, 291, 303–304, 316–317.

[63] Noah Webster, "An Examination into the Leading Principles of the Federal Constitution, by a Citizen of America," *Pamphlets on the Constitution of the United States Published during its Discussion by the People, 1787–88,* edited by Paul Leicester Ford (Brooklyn, N.Y.: n. p., 1888), pp. 40–41.

[64] John Dickinson, "Letters of Fabius," published in a Delaware newspaper and reprinted in *ibid.*, p. 169.

On the whole, constant reiteration of the "council of the States" concept during the ratification campaign—often by those who had opposed it in the Federal convention—extended its circulation to the point where, by the time the Senate was actually formed, it had a sufficient acceptance to be used by Federalists and Republicans alike—when it served their purposes.

FEAR OF A SENATE ARISTOCRACY

Critics of the Constitution's features affecting the Senate trained their heaviest guns on what they claimed was a too great concentration of power in the hands of a small group of men, whom they described as sable-clad aristocrats ever ready to usurp the rights of the people for their own aggrandizement. Here is the eloquent warning of Gilbert Livingston in the New York convention:

> Consider, sir, the great influence which this body, armed at all points, will have. What will be the effect of this? Probably a security of their reelection, as long as they please. Indeed, in my view, it will amount nearly to an appointment for life. What will be their situation in a federal town? Hallowed ground! Nothing so unclean as state laws to enter there, surrounded, as they will be, by an impenetrable wall of adamant and gold, the wealth of the whole country flowing into it. [Here a member, who did not fully understand, called out to know what WALL the gentleman meant; on which he turned, and replied, "A wall of gold—of adamant, which will flow in from all parts of the continent." At which flowing metaphor, a great laugh in the house.] The gentleman continued: Their attention to their various business will probably require their constant attendance. In this Eden will they reside with their families, distant from the observation of the people. In such a situation, men are apt to forget their dependence, lose their sympathy, and contract selfish habits. Factions are apt to be formed, if the body becomes permanent. The senators will associate only with men of their own class, and thus become strangers to the conditions of the common people.[65]

George Mason of Virginia saw the Senators as being "chosen, if not wholly, yet mostly, from the higher order of the people—from the great, the wealthy—the *well-born* * * *" while Rawlins Lowndes of South Carolina observed in the Senate a natural means of transition to a House of Lords:

> How easy the transition! No difficulty occurred in finding a king: The President was the man proper for this appointment. The Senate, hailing him a king, (constituted, according to Mr. Adams's description, from the well-born,) will naturally say to one another, "You see how we are situated; certainly it is for our country's benefit that we should be all lords;" and lords they are.[66]

The anticipated "aristocratic" complexion of the Senate was not generally attributed to its indirect election by the State legislatures. That method was seldom attacked, being considered perfectly natural—not only as a continuance of the method of electing delegates to the Congress of the Confederation and as a recognition of the Senate's role as representative of State sovereignty, but because a large proportion of the delegates to the State conventions were or had been members of State legislatures themselves and considered themselves well qualified to choose their States' Senators in the National Capital.

The "aristocrat" label was pinned on the Senate rather because of (1) the Senators' small number, (2) their long terms, and (3) their great powers—legislative, executive, and judicial.

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[65] *Elliot's Debates*, II, 287-288.

[66] *Ibid.*, IV, 311.

A favorite device of the critics was to point out that a quorum of the Senate would be only 14 men (a majority of the 26 Senators who would represent the original thirteen States) and then animadvert on the fact that a majority of this quorum would be only *eight* Senators. "Can we safely entrust this vast concentration of power in such few hands?" they, in effect, asked their colleagues. The very smallness of the Senators' numbers would give the upper House more "firmness and system" and increase its power at the expense of the more unwieldy House of Representatives.[67]

An even greater source of danger, according to the critics, would be the Senators' long terms of 6 years, which, they feared, would usually stretch into life tenure, since the Senators would use their other great powers to secure continuance in office term after term.

> * * * they are to be raised to a lofty eminence, and they will be loath to come down; and, in the course of six years, may, by management, have it in their power to create offices, and obtain influence enough to get in again, and so for life.[68]

Supporters of the Constitution replied that in view of the great powers and difficult duties assigned the Senate, especially with respect to treaties, long terms were necessary to promote experience, knowledge, stability, detachment from popular clamor, and confidence abroad. They ridiculed the idea of corruption to remain in office as "dreamings of a distempered fancy."[69]

As previously mentioned, one of the chief bones of contention in the New York convention was an amendment proposed by Gilbert Livingston to subject Senators to recall and render them ineligible to serve more than 6 years in any term of 12. Desirability of this enforced rotation was argued on the ground that Senators, by retirement from office and mingling with the people, would recover that knowledge of the people's interests and that sympathy with their feelings which "power and exalted station are too apt to efface from the minds of rulers."[70] Robert R. Livingston, on the other hand, argued that such rotation "is an absurd species of ostracism" which would proscribe demonstrated merit and remove "the strongest stimulus to public virtue—the hope of honors and rewards."[71] In Massachuetts, Theophilus Parsons contended that enforced rotation would not only deprive a man of honorable ambition, but would abridge the rights of the people by depriving them of the services of eminent public servants. In common with many other supporters of the long term, he emphasized that since one-third of the Senators would have to face reelection each biennium, the legislatures, and the people through them, could check any untoward grasp for power on the part of the Senate.[72]

Added to fear of the Senators' closely knit membership and long terms were grave apprehensions aroused by the great powers which the Constitution assigned to the upper House. As previously mentioned, much of this opposition to the Senate's "extra" powers came from those who were at heart opposed to equal State representation and who, realizing that there was no prospect of changing that feature of the Constitution, tried to do what they considered the next best thing—reduce the Senate's powers. Long years afterward, James Madison wrote that "it is well known that the large States, in both the Federal and State conventions, regarded the aggregate powers of the Senate as the most objectionable feature of the Constitution." [73]

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[67] For examples, see *ibid.*, II, 287; IV, 124.

[68] Samuel Nason in the Massachusetts convention; see *ibid.*, II, 135. For another example, see *ibid.*, II, 48.

[69] *Ibid.*, II, 46-47, 91-92, 292; IV, 40-41.

[70] The words are those of John Lansing; see *ibid.*, II, 293.

[71] *Ibid.*

[72] *Ibid.*, II, 91-92.

According to the critics, the total powers assigned to the Senate amounted to a dangerous concentration of power in the hands of a few men. The Senate had *legislative* powers equal to those of the House. Reserving to the lower Chamber the power to originate revenue legislation would be of slight importance since the Senate could amend—even, by amendment, substitute entirely different bills.[74] Senators shared the *appointing* power, which they could use to entrench themselves in the National Capital, especially since they were eligible for high executive offices themselves. The President's power to appoint Federal officers would be nullified by the Senate's confirming power, since the Senate could reject all his nominations and force him to acquiesce in the Senate's choice, or no appointment would take place.[75] Its power as the *court of impeachment*, added to the confirming power, would constitute a dangerous combination, since Senators would refuse to impeach a public officer in whose appointment (and possibly in whose crimes) they had shared. Such fear of corruption and "cabal" ran like a black thread through the whole fabric of the ratification campaign, rendering the impeachment question so important that Hamilton devoted two entire *Federalist* papers to the subject.[76]

Fear of Senate "despotism" had an important bearing on defeat of the Constitution in North Carolina's first ratifying convention, where Samuel Spencer climaxed an impassioned speech against the Senate's power with a solemn warning:

> For I think it must be obvious to every unprejudiced mind, that the combining in the Senate the power of legislation, with a controlling share in the appointment of all the officers of the United States, (except those chosen by the people,) and the power of trying all impeachments that may be found against such officers, invests the Senate at once with such an enormity of power, and with such an overbearing and uncontrollable influence, as is incompatible with every idea of safety to the liberties of a free country, and is calculated to swallow up all other powers, and to render that body a despotic aristocracy.[77]

The Senate power which aroused the gravest and most widespread apprehension was that associated with the *making of treaties.* Opponents of the Constitution expressed almost pathological fears that the Senate would use the treaty power corruptly and treasonably. A bare two-thirds of a Senate quorum—10 Senators—could in secret conclave sacrifice the dearest interests of the people, alienate the territory and commercial rights of the United States, even dismember the Union. Foreign gold would line the pockets of Senators, hungry for money and power. The Senate could usurp all the powers given other branches of the Government because under the Constitution treaties would supersede all laws.

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[73] Letter, Madison to Coles, Oct. 15, 1834, Farrand, *op. cit.*, III, 534. By specifying that such opposition came mainly from the *large* States, he probably referred to opposition caused by equal representation with the small States. However, in 1834 his memory may have been influenced by Federalist domination of the Senate throughout the first 12 years of the new government and its opposition to many of the projects Madison championed in the House during that period.

[74] *Elliot's Debates,* III, 377.

[75] *Ibid.*, IV, 116. This fear was expressed by Samuel Spencer in the North Carolina convention.

[76] For examples of such criticisms, see *ibid.*, II, 286 f., 530–541; III, 221–222, 402–405, IV, 116–118, 124. See also "The Objections of the Hon. George Mason, to the Proposed Federal Constitution, Addressed to the Citizens of Virginia," Ford, *op. cit.*, p. 330.

[77] *Elliot's Debates,* IV, 118.

Such fears were especially prevalent in the Southern States. Southerners feared that the Northern and Middle States would combine to pass treaties yielding the interests of the South to some foreign power. At Richmond, William Grayson, afterward a Senator from Virginia, anticipated that if southern Members were absent from the Senate floor for "just 1 hour," a treaty might be made yielding the navigation of the Mississippi to Spain, thus preventing the development of the Southwest and assuring the continued dominance of the North.[78]

Virginia and North Carolina so opposed the Senate's treaty power that their conventions proposed identical amendments providing that no commercial treaties be ratified without the concurrence of two-thirds of the *whole number* of Senators (to prevent such tricks as Grayson envisioned) and that no treaties yielding any territorial, fishing, or navigation claims of the United States be ratified without concurrence of *three-fourths* of the *whole number* of the Members of *both* Houses—this in spite of the fact that James Wilson's motion to include the House in the treaty power had been defeated at Philadelphia by a vote of 10 States to 1.[79]

The Senate's threat to the people's liberties was considered especially dangerous because of the upper Chamber's association with the President in the latter's executive powers—a blending of legislative and executive powers which was sure to end in tyranny. As to which of the two "partners in crime" would be stronger, the anti-Federalists were not sure. In Virginia, Grayson saw an alliance between the President and the Senators of the New England and Middle States. Mason predicted a "marriage" between President and Senate which would destroy all balances in the Government. Spencer in North Carolina urged establishment of an entirely separate advisory council to the President which would give him the independence from the legislature that a check-and-balance system required.[80]

To combat all these alarms, the proponents of the Constitution had one powerful argument—that of checks and balances. Visions of all power concentrated in the hands of the Senate were mere delusions, said they, since the Senate would not hold a single grant of power which was not accompanied by a check by some other branch of the Government. The State legislatures had the original check, through the power to elect and reelect. They could be depended upon to elect the best men—not the most corruptible, as implied by their opponents. The Senate could pass no law without the cooperation of the House. The power to confirm public officers was a negative one only, since the President would have sole power to nominate. The impeachment power could not be exercised by the Senate alone, since the upper House could merely try such officers as were impeached by the House. The treaty power was circumscribed by the two-thirds requirement and by the President. On the other hand, the Senate itself would be a wholesome check against too much power in the hands of the President and the House.

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[78] *Ibid.*, III, 501–502. For examples of the dread of Senate misuse of the treaty power, see also *ibid.*, III, 61, 221, 315–316, 402, 500–502; IV, 115, 265–266.

[79] *Ibid.*, III, 660–661; IV, 245–246.

[80] *Ibid.*, III, 492–494; IV, 117–118. For a discussion of these and other fears of Senate tyranny, see Cecelia M. Kenyon, "Men of Little Faith: Anti-Federalists on the Nature of Representative Government," *William & Mary Quarterly*, XII, 3d ser. (January 1955), 25–29.

Moreover, said the defenders of the Constitution, objections to alleged concentration of power in the Senate came with ill grace from those who claimed that the solution to America's problem lay in giving the existing Congress additional powers. That would aggravate a system under which *all* the power, legislative and executive, was vested in a single body with no check from a second house or from an independent executive. Hamilton observed at Poughkeepsie that to use the old Confederation as the basis of the new system and giving it power over purse and sword would be to establish a despotism, the very definition of which is "a government in which all power is concentrated in a single body." Nor, said the friends of the Constitution, did such objections come with better grace from the defenders of State sovereignty, since it was a ridiculous contradiction to defend that sovereignty and at the same time to object to assignment of powers to the very branch which represented it.[81]

William R. Davie of North Carolina tried hard to hammer this point home to the doubting Thomases of the Hillsborough convention:

> The honorable gentleman [Mr. M'Dowall] has spoken of a consolidation in this government. That is a very strange inconsistency, when he points out, at the same time, the necessity of lodging the power of making treaties with the representatives, where the idea of consolidation can alone exist; and when he objects to placing it in the Senate, where the federal principle is completely preserved. As the Senate represents the sovereignty of the states, whatever might affect the states in their political capacity ought to be left to them. This is the certain means of preventing a consolidation. How extremely absurd is it to call that disposition of powers a consolidation of the states, which must to all eternity prevent it![82]

It scarcely needs to be said that these defenders of the Senate and its powers won the day, since the Constitution was ultimately ratified by all the States. When constitutional amendments were adopted to meet objections raised at the State conventions, none directly affected the Senate. There seemed to be, on the whole, a general feeling that Federal power had been judiciously distributed and that the Senate should have a fair chance to prove itself. However, it is well to remember that this victory did not come without a struggle. Fear of Senate power and alleged tendency to aristocracy continued to smolder in certain quarters, ready to burst into flame when inflammable matter was thrown on the coals.

In the meantime, the country was left with many unanswered questions about the Senate it had accepted. Would it, in truth, become a "House of Lords," as its critics claimed? Would it represent the wealth of the land? Would it, in sinister secrecy, hatch schemes to sell the country's interests by treaty for its own Members' gain?

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[81] *Elliot's Debates*, II, 46, 233–234, 285, 323–324, 438–439, 476–477; III, 38–40; IV, 119–124, 276. See also Tench Coxe, "An Examination of the Constitution for the United States of America, by an American Citizen," Ford, *op. cit.*, pp. 140–142; James Wilson, "Substance of an Address to a Meeting of the Citizens of Philadelphia, October 6, 1787," *ibid.*, p. 158; James Iredell, "Answers to Mr. Mason's Objections to the New Constitution, Recommended by the Late Convention, by Marcus," *ibid.*, pp. 337–342; Dr. David Ramsay, "An Address to the Freemen of South Carolina on the Subject of the Federal Constitution, etc." *ibid.*, p. 376.

[82] *Elliot's Debates*, IV, 123–124.

Would the Senators ensconce themselves for life at the National Capital and usurp the powers of the other branches? Or would they, by their wisdom and experience, improve the legislative process? Would they provide the President with wholesome advice and restraint? Would they, indeed, represent the sovereignty remaining with the States and defend it against Federal encroachments?

The country had listened attentively to the prophecies as to what a theoretical Senate would or would not do or be. Now it remained for a flesh-and-blood Senate to demonstrate in actual practice which of the prophets wore the mantle of Elijah.[83]

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[83] In the previous pages little has been said about the justly famous defense of the Constitution by the authors of *The Federalist,* which includes five letters (Nos. 62 to 66) specifically defending the Senate, and three more (Nos. 75 to 77) which discuss the powers given to the President "by and with the advice and consent of the Senate."

These letters have not been discussed here in detail because they are so generally available and because most of the arguments they present have been discussed in other connections. The letters affecting the Senate are well summarized by Haynes, *op. cit.,* I, 34–38. The letters themselves merit careful study not only as extremely able expositions of the Constitution but because of their relation to current public opinion. Since the authors dealt particularly with provisions of the Constitution which had been subject to attack in the Federal convention and in the early State conventions, as well as in newspapers, broadsides, and pamphlets, one can discern in *The Federalist* the principal arguments levelled against the Senate during this critical period. Also, this work, brought out in book form in May 1788, had a powerful, although immeasurable, effect on public opinion in the years following.

It will have been noted that the Senate was the creature of a medley of compromises—often on collateral issues. Yet the authors of the Federalist letters were remarkably successful in picturing the Senate as the result of a deliberate effort to establish a body that would not only represent the sovereignty left to the States but would serve as a stabilizing factor in the new Government. The upper House appeared as the studied product of an endeavor to establish a body small enough to act with secrecy and dispatch; wise enough to check the partisanship, impetuosity, and ignorance of the popularly-elected lower House, and particularly qualified to advise and restrain the President in the exercise of his powers.

It should be remembered that the arguments in *The Federalist* did not necessarily reflect the personal convictions of the authors. For instance, Hamilton personally favored a far more centralized government than the one provided for in the Constitution, while Madison was personally opposed to equal representation in the Senate, which he nevertheless ably defended.

CHAPTER III

THE SENATE IN THE "TRANSITIONAL" PERIOD

THE FIRST SENATE ELECTIONS

In contrast to its conspicuous role in the ratification drama, the Senate remained in the wings most of the time during the between-the-acts performances following adoption of the Constitution and preceding inauguration of the new Government.[1]

The reasons for this were simple—the people had no direct part in electing their Senators, and insufficient time had elapsed to develop notable and public rivalries for Senate seats. In contrast, elections of House Members attracted a considerable amount of attention. House seats were often hotly contested and the campaigns involved careful political organization, to say nothing of confusion caused by faulty election laws and complicated methods of election.

However, with respect to the Senate, there developed within the walls of the legislatures a controversy regarding the method of election which was not finally settled for many years. This involved the question whether the two houses of the legislatures should elect Senators by *joint* or by *concurrent* vote. Under the former method, members of the two houses sit together as in a single assembly and vote numerically; under the latter, the two houses sit separately and take independent votes. The Constitution unfortunately did not prescribe which method should be used, merely providing (art. I, sec. 3, par. 1) that the Senate "shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years * * *." Concurrent votes enhanced the power of the smaller upper houses, which thus had a voice equal to that of the more numerous lower chambers, while joint votes were to the advantage of the lower houses, whose large memberships could swamp the small number of upper house members.

The concurrent-vote method was probably backed by sounder theory, since by "Legislature" the framers of the Constitution very likely meant those bodies acting in their regular legislative capacity, each chamber having a veto on the other. This was the opinion of both Story and Kent in their commentaries on the Constitution.[2] However, that method had the practical disadvantage of provoking frequent deadlocks between the two houses, the stubbornness of each sometimes preventing election of Senators for long periods. Also, in several of the States the joint-vote method was more natural, since it was already in use in election of certain State officials and thus quoted as a precedent by those who favored that method.

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[1] This period is described in the University of Pennsylvania Ph. D. dissertation by Frank Fletcher Stephens, *op. cit.* Ch. II (pp. 10–30) discusses the first elections to the Senate, while ch. III (pp. 31–66) deals with the first elections to the House.

See also Charles Oscar Paullin, "First Elections Under the Constitution," *Iowa Journal of History and Politics*, II (January 1904), 3–33.

[2] George H. Haynes, *Election of Senators* (New York: Henry Holt & Co., 1906), pp. 20, 26. Haynes cited Story, secs. 705–708, and Kent, pt. II, lecture 11.

Frank Fletcher Stephens described in some detail the proceedings of most of the legislatures on this question in 1788. His study shows that most States adopted the joint-vote method apparently with little controversy. Two States—Pennsylvania and Georgia—did not face the problem at all in 1788 because their legislatures were then unicameral. The New Hampshire lower house was obliged to acquiesce in a concurrent vote when the State's senate refused to go into "convention"—this in spite of the fact that its two houses were accustomed to meet in joint session to debate important questions.[3] In Massachusetts, a 2-week-long deadlock between the two houses was broken by a compromise under which presidential electors were to be elected by joint vote and Senators by concurrent vote. Then a further deadlock between the two houses over one of the choices was only avoided by the withdrawal of Charles Jarvis, the candidate nominated by the house.[4]

Absence of a rule prescribing which method was proper was most keenly felt in New York. There a vehement contest between the Federalist upper house and the anti-Federalist lower house, beginning 10 days after the opening of the assembly on December 10, 1788, was not resolved by March 3, 1789—when the assembly adjourned without having elected the Senators for the term beginning the next day. Subsequently, after a vigorous election campaign for control of the legislature had resulted in a Federalist majority in both houses, a new election bill promptly passed both houses providing for an initial concurrent vote. If the nominations of each house agreed, those nominated would be elected. Otherwise, if two Senators were to be chosen, the house was to choose one from two senate nominations and the senate one from among the house nominations. If only one Senator was to be chosen, the election was to be by concurrent vote.

However, the State's council of revision rejected this bill on constitutional grounds, claiming that it enabled both houses independently to choose Senators neither of whom might be approved by the other, in direct opposition to the Federal Constitution, which prescribed choice by the *legislature*. The assembly refused to override this veto, and shortly passed a bill providing for a straight concurrent vote. Both houses immediately chose Gen. Philip Schuyler as one of the Senators. After the senate had rejected James Duane, choice of the house, and the house had rejected Ezra L'Hommedieu, choice of the senate, both houses agreed on Rufus King as the second Senator. However, the prolonged dispute had cost New York its representation in the U.S. Senate for most of its first session.

Parenthetically, this election was also fruitful of another interesting development in New York politics. In electing the head of the Schuyler clan to the Senate and then ignoring the rival Livingstons in favor of the Yankee "interloper" Rufus King, the New York Federalists gave the Senate one of its ablest Members but aroused the bitter resentment of the powerful Livingston clan, especially since Robert Livingston was later passed over for the post of Chief Justice of the United States in favor of John Jay. The Livingstons obtained their revenge the following year by arranging for Schuyler's defeat (he had drawn the 2-year term in the Senate), in spite of the fact that his was the only name originally presented. Startled by their success, they had to name a candidate in a hurry. The name of Aaron Burr was suggested, and here began the national political career of that enigmatic personality.[5]

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[3] William Plumer, Jr., *Life of William Plumer* (Boston: Phillips, Sampson & Co., 1857), p. 101. The author of this biography was a son of its subject, who was a member of the New Hampshire House of Representatives at this time.

[4] *Connecticut Courant*, Dec. 1, 1788.

When Pennsylvania's new constitution providing for a bicameral legislature went into effect in the autumn of 1790, that State also faced the question of whether to elect Senators by joint or concurrent vote. The necessity of making a decision became pressing in February 1791, when the assembly faced the duty of filling the Senate seat occupied by the petulant William Maclay, who had drawn the 2-year term. The conservative senate insisted on election by a concurrent vote, while the house, which that year was controlled by a more democratic element, was equally insistent on a joint vote. Not only did March 4 go by without a decision having been made, but that session of the assembly and two more went by without a retreat by either house. The deadlock was not broken until February 1793, when the minority in the senate favoring a joint vote found itself a momentary majority on the senate floor and passed a house-sponsored measure providing for a joint vote. Albert Gallatin was subsequently elected by that method. But this is getting far ahead of the story.[6]

These disputes between upper and lower chambers of State legislatures were invariably couched in constitutional terms, but just as invariably reflected more immediate and practical considerations. Involved, of course, was the natural desire on the part of each house to defend or extend its own power. Also, the upper chambers, further removed from the people, generally endeavored to obtain the election of men identified with the propertied elements of the State, while the more popularly chosen lower chambers tried to elect men of a more democratic orientation. In Massachusetts, the nature of the struggle was revealed by the political orientation of the candidates presented by the respective houses. Both chambers acquiesced in the choice of Caleb Strong, who became one of the top Federalist leaders in the Senate, but for the other seat the House supported Dr. Charles Jarvis, who supported the Constitution but later became a Jeffersonian stalwart, and (after he had declined the nomination) Nathan Dane, who had opposed adoption of the Constitution. Concurrent votes made possible the victory of the senate's final choice, Tristram Dalton, who in the Senate proved himself a faithful Hamiltonian. The Massachusetts senate's insistence on a concurrent vote continued to irritate the *Independent Chronicle*, Boston Republican newspaper, which berated the "aristocratical" upper house for its "usurpation" in assuming to itself the right to an equal share in senatorial elections.[7]

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[5] Samuel H. Wandell and Meade Minnigerode, *Aaron Burr* (New York: G. P. Putnam's Sons, 1925), I, 147–148.

[6] Raymond Walters, Jr., in an article "Spokesman of Frontier Democracy: Albert Gallatin in the Pennsylvania Assembly," *Pennsylvania History*, XIII (July 1946), 181 fn., disagreed with the Stephens view that the Pennsylvania dispute reflected a political struggle between a Republican house and a Federalist senate. He claimed that Hildreth (IV, 448) was nearer right in considering the controversy sectional—the West wanting representation—but that even this was oversimplifying the issue. However, in Philadelphia at the time the Federalist *Gazette of the United States* and the Republican *National Gazette* took opposite sides in the dispute and apparently considered it a party issue. See *Gazette of the U.S.*, Sept. 14, 1791, and *National Gazette*, Jan. 16, 1792.

[7] *Independent Chronicle* article quoted in the *National Gazette*, Mar. 13, 1793.

Leaving the method of electing Senators to the choice of the individual States led to so much controversy that in 1866 the Congress of the United States passed a law providing that each Chamber should first vote separately; if their choice did not fall on the same person, they would then vote jointly.

In choosing their first U.S. Senators, several of the legislatures took particular pains to divide the two Senate seats between major geographical or economic divisions within their States. In Maryland, a resolution of the general assembly provided that one Senator was to be from the east shore and the other from the west.[8] In Georgia, the assembly resolved that one of the Senators must be a resident of one of the coastal counties of Chatham, Effingham, Burke, Liberty, Camden, or Glyn, while the other must be a resident of one of the upland counties of Richmond, Wilkes, Franklin, Greene, or Washington.[9] In Pennsylvania, the financier Robert Morris of Philadelphia was balanced by Maclay from the agricultural Harrisburg area. "Every Pennsylvanian," said the *Pennsylvania Gazette*, "must feel a high satisfaction in this respectable representation of the *landed* and *commercial* interests of this State." [10] In New York, Rufus King, a lawyer now closely identified with the New York City commercial element, was chosen to serve with Philip Schuyler, who, although involved in finance and other business ventures, was best known as the owner of thousands of acres of valuable land in the Mohawk and Hudson River Valleys.[11] Both of the Carolinas endeavored to give representation to the back country as well as the tidewater. South Carolina sent Ralph Izard of the Charleston area and Pierce Butler, a recognized spokesman for the back country although himself wealthy and aristocratic. North Carolina elected Samuel Johnston of Edenton, on Albemarle Sound, and Benjamin Hawkins of Warren County, who was closely connected with the West through his activities as commissioner to deal with the Indians.

In Virginia, geography did not seem to be a factor, since the legislature chose William Grayson of Prince William County and Richard Henry Lee of Westmoreland. In that State election of Senators was part of the larger picture of opposition to the new Constitution led by Patrick Henry. In anti-Federalist strategy, support of New York's call for a second national convention went hand in hand with election of Senators and Representatives unfriendly to the Constitution, possibly in the hope that a hostile Congress would "commit suicide" on "its own Authority," to use the words of James Madison.[12]

It was natural that Madison's friends should urge that effective campaigner for the Constitution (then one of Virginia's delegates to the Congress of the Confederation) to declare his willingness to serve in the Senate, and this they did. Madison himself stated that he would accept a seat in either House in order to help launch the new Government, but that he would prefer the House of Representatives, for three reasons: (1) because service in the Lower House would "only be to the public, and, not even in imputation, to myself"; (2) because he believed he could obtain election to the House from the people with less disagreeable electioneering than would be required to obtain election to the Senate in the assembly, and (3) because he feared a Senate seat would require a higher "stile of life" than he could afford.[13] However, when it came time for the assembly to elect the Senators, Patrick Henry was able to engineer the election of two outspoken opponents of the Constitution—Grayson and Lee. The argument against Madison was that his proconstitutional opinions were out of harmony with those of the majority of the assembly—more specifically, that he could not be counted upon to obey assembly instructions to vote against direct taxes. The vote was Lee 98, Grayson, 86, and Madison 77.[14] Madison later defeated James Monroe for a House seat, despite Henry's gerrymandering.

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[8] *Pennsylvania Gazette,* Dec. 24, 1788.

[9] Letter from Albert B. Saye, professor of political science, University of Georgia, July 30, 1957, quoting Georgia *House Journal,* 1789, p. 43, as shown in typed copy in the library of the university.

[10] *Pennsylvania Gazette,* Oct. 1, 1788. Italics are in the original. Maclay was at this time considered a Federalist.

[11] The *Gazette of the United States* for Feb. 9, 1791, contained a Federalist protest against election of Burr as Schuyler's successor, on the ground that it was an "insult" to the people of the northern part of the State and possible only because that section was underrepresented in the assembly.

[12] Madison to Washington, June 27, 1788, Gaillard Hunt (ed.), *Writings of James Madison* (New York: G. P. Putnam's Sons (1900–1910), V, 235.

Some months previously, George Washington had written that the struggle for the Constitution was not over with ratification, but that everything depended on the defeat of "antifederal characters" who would try to "embarrass the wheels of government" in the new Congress.[15] As the returns came in from both House and Senate elections, he and all other supporters of the Constitution could be confident that the new Government would be inaugurated by its friends. With respect to the Senate, they did, indeed, deeply regret Madison's defeat in the Virginia assembly, but were elated by the fact that Lee and Grayson were the only avowed opponents of the Constitution elected anywhere. In fact, the Federalist press saw in the election to the Senate of friends of the Constitution—especially the large number who had served in the Philadelphia convention—a second ratification of that document.[16] As the months went by, even vigorous opponents of the new system seemed willing to give it a fair chance and to content themselves with plans for amendments, constitutionally introduced.

THE FIRST SENATE CHAMBER

On September 13, 1788, the Congress of the Confederation sitting in New York finally passed a resolution fixing that city as the place and March 4, 1789, as the time for inaugurating proceedings under the new Government.[17] In view of weather and road conditions during that time of year, this date was quite unseasonable, but was decided upon to enable the new Congress to pass a tariff law in time to apply to the spring imports and thus provide the National Government with an early and much needed revenue.[18]

Considerable delay preceded designation of New York City as the place. This was due in part to the inevitable sectional maneuvering. It was also due to an effort on the part of earnest friends of the Constitution to delay announcements for putting the new Government into operation until the election of new legislatures, which were expected to be more friendly to the Constitution than the old—a strategy which worked well, judging from the political complexion of the Senators these legislatures elected.[19]

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[13] Madison to Edmund Randolph, Oct. 17, 1788, and Nov. 23, 1788; Hunt, *op. cit.*, V, 276–277. 304.

[14] Edmund Randolph to Madison, Nov. 10, 1788, Moncure Daniel Conway (ed.), *Omitted Chapters of History Disclosed in the Life and Papers of Edmund Randolph* (New York: G. P. Putnam's Sons, 1888), p. 120.

Lee himself said he was willing to serve in the Senate only because it offered opportunity to help amend the Constitution in the interest of civil liberties. See letter Lee to John Jones, Oct. 15, 1788, James Curtis Ballagh (ed.), *The Letters of Richard Henry Lee* (New York: Macmillan Co., 1911), II, 478–479. Madison favored such amendments in order to calm the fears of the opponents of the Constitution.

[15] Washington to Benjamin Lincoln, Aug. 28, 1788, John C. Fitzpatrick (ed.), *Writings of George Washington* (Bicentennial ed.; Washington, D.C.: Government Printing Office, 1931–44), XXX, 62–63.

[16] *Pennsylvania Gazette,* Nov. 5, 1788; Nov. 26, 1788; Dec. 10, 1788; Dec. 17, 1788; Dec. 31, 1788.

[17] The date was set in a committee report several weeks earlier, and was not afterward changed. However, it was not finally approved until adoption of all the arrangements on Sept. 13.

[18] Madison to Jefferson, Mar. 29, 1789, Hunt, *op. cit.*, V, 335.

Pennsylvania, which held its senatorial election on September 30, 1788, was the first State to name its Senators. Elections in the other States were scattered over a period of several months. Elections for the House were almost invariably held later, enabling men like Madison who had been defeated for the Senate to offer themselves as candidates for the lower Chamber.

The citizens of New York City meanwhile went to great pains to provide convenient and handsome accommodations for the new Congress, being—

> desirous of testifying their attachment to the new National Government, and of making their city the place of the permanent residence of the Federal Legislature.[20]

With funds raised by popular subscription and following plans drawn by Maj. Pierre Charles L'Enfant, the old city hall was remodeled and refurbished into an edifice that excited the admiration of all—including House and Senate Members as they arrived in the city. Senator William Paterson, of New Jersey, described it as the most elegant building he had seen anywhere. In fact, the New Yorkers' efforts were too extravagant for the frugal taste of New Hampshire's penny-wise Senator Paine Wingate.[21]

The Senate did, indeed, have reason to be pleased with these first accommodations. A richly decorated vestibule on the first floor led in the center to the large, octagonal House Chamber, and by a public staircase on the left and a private one on the right, to the Senate Chamber on the second floor. This room, 40 feet long and 30 feet wide, was furnished in a style to satisfy the fancy of even the most aristocratic Members of the "upper House"—a phrase which now had a double meaning.

The arched ceiling was adorned in the center by a sun and 13 stars, expressing hope for the early attachment of Rhode Island and North Carolina to the new Government. Pilasters of L'Enfant's own design, high windows curtained in crimson damask, handsomely carpeted floors, several fireplaces of beautifully polished American marble—all bespoke a dignified elegance considered appropriate to the Senate's place in the new system. The Members' chairs were arranged in semicircles, while the Vice President's chair was at one end of the room, elevated about 3 feet from the floor, under a rich canopy of crimson damask—appointments which evoked some cynical anti-Federalist comments when compared to the plainness of the Speaker's chair downstairs.[22] Also on the second floor were located a library, lobbies, and committee rooms. On one side of the building, on the Senate Chamber level, guarded by an iron railing, was a platform more than 200 feet long, providing a convenient walk for members seeking a breath of fresh air.[23]

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[19] Madison to Washington, July 21, 1788, *ibid.*, p. 238.

[20] *Columbian Magazine*, August 1789.

[21] Letter, Paterson to his wife, Mar. 24, 1789, cited by Gertrude Sceery Wood, *William Paterson of New Jersey, 1745–1806* (Ph. D. Dissertation, Political Science Department, Columbia University, 1933) (Fair Lawn, N.J.; Fair Lawn Press, Inc., 1963), from the *Somerset County Historical Quarterly*, II, 183.

Letter, Wingate to Timothy Pickering, Mar. 25, 1789, Charles E. L. Wingate (ed.), *Life and Letters of Paine Wingate* (Medford, Mass.: Mercury Printing Co., 1930), II, 290.

[22] James Grant Wilson (ed.), *Memorial History of the City of New York* (New York: New York Hist. Co., 1892–93), III, 46–47.

Although the House Chamber had two galleries and also a space on the floor (set apart by a bar) for the accommodation of visitors, no such facilities were provided for the Senate Chamber. Evidently the designers anticipated that the august Senators would meet behind closed doors.

The location of the Capitol involved one inconvenient feature. Situated as the edifice was—at the head of Broad Street in the very heart of the city, the front portico actually jutting out into Wall Street—three large Senate Chamber windows admitted the noise of traffic clattering by within inches of the building. This circumstance was to be of some moment a few months later when President Washington visited the Chamber to discuss an Indian treaty.

One other feature of the accommodations for Congress should be mentioned, although it involves a question so abstract that its importance is difficult to measure. It will be recalled that during the debate on the Constitution a great deal was said about the Senate as a council to the President. Some observers believed that the Senate's duties with respect to appointments and treaties would take so much of the upper Chamber's time as to keep it almost constantly sitting. The Senate was to be partially legislative and partially executive in character. From this beginning in New York, however, the Senate was housed in close proximity to the House of Representatives, a fact which may have had some agency in emphasizing the legislative nature of the Senate at the expense of the executive. The one time that President Washington entered the Senate Chamber, he came definitely as a "visitor." This point should not be belabored since the chief reason for the emphasis on the legislative nature of the Senate was the fact that its legislative duties proved to be of greater day-by-day importance. However, physical proximity to the House was probably of some influence in identifying the Senate more closely with the lower house. President Washington realized that the location of his meetings with the Senate was of some importance, and looked forward to the day when an executive chamber would be provided in the Capitol where he could meet with the Senators. However, by the time such a chamber was provided, the relations between the President and Senate had congealed in a contrary mold.

"The Languor of the Old * * *"

While eager artisans were busy with hammer and saw preparing a residence fit for the new Congress, the old was dying a lingering death. October 10, 1788, was the last day on which the latter transacted any business. Thereafter occasional delegates continued to put in appearances and present credentials in order to keep the slender thread of organized National Government intact. Soon attendance dwindled to one. On 9 days from January 8 to March 2, 1789, one member attended, never the same one. The *Journals of the Continental Congress* end abruptly on Monday, March 2, reporting that Mr. Philip Pell of New York attended.[24]

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[23] This description in the *Columbian Magazine* of August 1789 is that of an eyewitness and was accompanied by an excellent drawing of the building. For another excellent and detailed description, see the *Connecticut Courant*, Mar. 30, 1789.

[24] Worthington C. Ford *et al.* (eds.), *Journals of the Continental Congress, 1774–89* (Washington, D.C.: Government Printing Office, 1904–37), XXXIV, 599 fn., 601–605.

After the great public interest centering upon the framing and ratification of the new Constitution, the subsequent elections, and these elaborate preparations for the reception of the new Congress, the date March 4, 1789, was, of course, awaited with eager anticipation as the beginning of a new era.[25] The Capital City ushered in that day of days with the booming of cannon and ringing of bells. "A general joy pervaded the whole city on this great, important, and memorable event." [26]

Unfortunately, the jubilation soon died for want of fuel. Only 13 House Members and 8 Senators appeared at the Federal Hall on the appointed day to present their credentials, the Senators including Langdon and Wingate of New Hampshire, Strong of Massachusetts, Ellsworth and Johnson of Connecticut, Maclay and Morris of Pennsylvania, and Few of Georgia. Nor was the delay merely momentary. Days stretched into weeks without a quorum in either House. Without a quorum, no authority could be granted for transaction of any business in behalf of the new government. When the House of Representatives finally achieved a quorum on April 1, it had to wait 3 more days before the 12th Senator arrived to make a quorum in the upper House.

The absence of a congressional quorum the first day seems to have been taken by the public in good spirit, but as the days became weeks and the requisite number of Members did not show up, impatience became exasperation and at length became resentment. By March 25, Representative Fisher Ames was deeply discouraged.

> I am inclined to believe that the languor of the old Confederation is transfused into the members of the new Congress * * *. We lose £1,000 a day revenue. We lose credit, spirit, everything. The public will forget the government before it is born * * *.[27]

Down at Mount Vernon a man with a strict sense of duty regretted the "stupor, or listlessness" of many Members of the new Congress, wondering how those who sought public office could reconcile such conduct with their sense of propriety, and hoping that the evening's mail would bring news of a quorum in both Houses.[28]

The dilatory Senators naturally aroused criticism not only of themselves but of the nascent Senate in which they had been elected to serve. Representative Henry Wynkoop probably expressed the opinion of many when he wrote on April 2 that their conduct savored "too much of the remains of Monarchical Government, where those promoted to public office consider themselves as clothed with Majesterial [*sic*] Dignity instead of confidential servants of the People." "I hope, however," he continued, "before we rise those Matters may be placed upon a more proper footing and be better understood." [29]

Four days later the arrival of Richard Henry Lee from Virginia brought the Senate a quorum and that house could proceed to try to bring this hope to fruition. But placing "those Matters" upon "a more proper footing" was neither quick nor easy, as will be seen in the following chapters.

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[25] There was some confusion about the turnover from the old government to the new. On Mar. 25, 1789, Fisher Ames, a Member of the House, wrote: "The old Congress still continues to meet, and it seems to be doubtful whether the old government is dead, or the new one alive." See Seth Ames (ed.), *Works of Fisher Ames* (Boston: Little, Brown & Co., 1854), I, 32.

[26] *Pennsylvania Gazette,* Mar. 11, 1789.

[27] Letter, Ames to George Richards Minot, Mar. 25, 1789, Ames, I, *loc. cit.*

[28] Letter, Washington to the Acting Secretary of War, Apr. 10, 1789, Fitzpatrick, *op. cit.,* XXX, 280.

[29] Letter, Wynkoop to Dr. Reading Beattie, Apr. 2, 1789, "The Letters of Judge Henry Wynkoop, etc.," *Pennsylvania Magazine of History and Biography,* XXXVIII (January 1914), 48.

CHAPTER IV

CHARACTERISTICS OF MEMBERSHIP

Before the machinery of the new government began to hum in April 1789, the U.S. Senate was, of course, merely an abstraction in the minds of those who had planned, or merely thought about, the new system. It remained for flesh-and-blood statesmen and politicians to transform the picture drawn by fancy into a living institution.

At the Philadelphia Convention, delegates had discussed the Senate in terms of "wise elders," "defenders of property," men of experience, responsibility, stability. After all these surmises of the planning stage, it is natural first of all to inquire about the background and the caliber of the men actually sent to the Senate in this formative period.

Such questions must of necessity call forth highly subjective answers. Because of the halo placed upon men of the past by the stirring historical events of which they were a part—and because the outstanding men of any period are remembered while the run-of-the-mill individuals are forgotten—it is easy to evaluate the Congresses of past years too highly in comparison to those of more recent years. Also, in that day as in this, the Senate was composed of a group of such individualistic personalities that generalization is difficult indeed.

Yet, even bearing in mind these warnings, it can still be stated that the Senate in this early period consisted of a group of men who would have done credit to any legislative body anywhere. Whether they were of such high caliber and maturity as to be far superior to the membership of the House of Representatives, whose work they were to improve and whose impetuosity they were to check, cannot be so positively stated. The House, in such leaders as Madison, Ames, Gallatin, and Speaker Muhlenberg, could boast some of the most eminent statesmen of the day. However, because of its larger membership—59 in the first Congress—it also included many of more modest attainments.

Men of Maturity and Experience

While wisdom or intelligence are difficult to measure and compare, one other quality can be measured with a fair degree of accuracy—experience. On this test the first Senators rated very high.

The Revolution itself, the Congress of the Confederation with its vexing problems, local legislatures and executive branches in the transition from colony to statehood, State constitutional conventions, the Philadelphia Convention and subsequent ratifying conventions—these all provided experieces in statecraft that few other periods have offered. All but 1 or 2 of the 94 Senators who served during the period 1789 to 1801 had had the advantage of one or more of these fields of experience before coming to the Senate.[1]

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[1] These 94 Senators include Aaron Ogden, who served only 1 day within this period, but not Gallatin, who attended and voted but was afterward declared ineligible.

Today, membership in the Constitutional Convention would probably be considered the highest possible recommendation. In 1789, the delegates to that Convention had not yet been beatified, although their selection for that important meeting naturally indicated that they had the confidence of their contemporaries. At any rate, of the 20 Senators who presented their credentials at or near the beginning of the first Congress, exactly half had been members of the Convention at Philadelphia—Oliver Ellsworth and William S. Johnson of Connecticut, Richard Bassett and George Read of Delaware, William Few of Georgia, Caleb Strong of Massachusetts, John Langdon of New Hampshire, William Paterson of New Jersey, Robert Morris of Pennsylvania, and Pierce Butler of South Carolina. Later, when New York finally solved its election problem, it sent Rufus King, who had been a member of the Convention from Massachusetts.

As this period progressed, seven more members of the Philadelphia Convention were sent to the Senate—Roger Sherman of Connecticut in 1791, Alexander Martin of North Carolina in 1793, William Blount of Tennessee in 1796, Charles Pinckney of South Carolina in 1798, Abraham Baldwin of Georgia and Jonathan Dayton of New Jersey in 1799, and Gouverneur Morris of New York in 1800. Of this total of 18, all but Alexander Martin either signed the document or otherwise expressed their approbation. Most of these 18, as well as at least 25 other Senators of this period, served in the ratifying conventions of their States.

Forty-two of these ninety-four Senators had had experience as legislators for the Nation through service in the Continental Congress or Congress of the Confederation, and thus knew firsthand about the frustrations and difficulties of that body. Many of these future Senators had been among the most hardworking members of these previous Congresses—men like Oliver Ellsworth and Roger Sherman of Connecticut, Richard Henry Lee of Virginia, Dr. Jonathan Elmer of New Jersey—men who had borne the burden and heat of the day in the often thankless tasks of the pre-Constitution years. A few had held other offices under the Confederation government—Robert Morris as superintendent of finance and others as admiralty judge, Indian commissioner, diplomatic agent, or western territorial official.

Eighty-four of the ninety-four had served at some time in their State or Provincial legislatures, many of them having rendered long and conspicuous service in these State bodies. Several had been speaker of their legislatures. Twenty-five had served in the conventions which wrote the State constitutions after the separation from Great Britain. Nine had served as Governor. Twenty-one had served as State or county judge. Others had held such office as mayor, State attorney general, or State treasurer. All in all, nearly every one of them had served his State government in some capacity before entering the U.S. Senate.[2]

As time went on, the State legislatures took experience in the U.S. House of Representatives into consideration when electing men to the

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[2] The biographical material concerning the Senators who served in the first six Congresses has been compiled chiefly from the *Biographical Congressional Directory*, the *National Cyclopedia of American Biography*, the *Dictionary of American Biography*, and *Appleton's Cyclopaedia of American Biography*. The figures may not be absolutely accurate due to absence of information on a few of the Senators and conflicting information on others. However, they are accurate enough to show correctly the general picture.

Senate. Twenty-two of the Senators who served during the period under discussion—about one-third of those elected after the first Congress—had had previous experience in the lower House. This is approximately the same proportion as at present, 37 of the 96 Senators serving in the 85th Congress having had previous House experience.[3]

These figures concerning the early Senators' previous political service are significant, not only for the high level of political experience they reveal, but because they emphasize the fact that the U.S. Senate was not an alien body thrust upon reluctant States but was composed of men who had been very close to the political life of their States.

At the present time, State legislatures are less an avenue to the U.S. Senate than they were in this early period, only 31 percent of the Senators in 1958 having had such previous service, compared to 88 percent in the period 1789–1801. On the other hand, while less than 10 percent of the Senators of the earlier period had served as Governor, in 1958 25 percent had served in such capacity, indicating the Senate's growth in prestige and dignity.

It will be seen that there was a significant continuity between the Government of the old Confederation and the new Government under the Constitution. As John Adams delivered his address accepting the Senate chair in 1789, he was moved by the sight of "so many of those characters of whose virtuous exertions he had so often been a witness and whose friendship had supported him in his past public service."[4]

SOLDIER-SENATORS, 1789–1801

Most of these early Senators had seen active service in the patriot cause during the Revolutionary War, a fact that should be remembered when considering the charges of "Toryism" leveled at the Senate by its critics in the bitter party warfare of the 1790's.

Because of the irregular nature of much of the Revolutionary fighting, much of which was done by informal militia and other auxiliary troops, and because civilian members of councils of safety and committees of correspondence often risked their lives in the patriot cause quite as much as did strictly military personnel, it is difficult to give a meaningful figure as to how many of these 94 Senators were "veterans" of the Revolution. However, about 58 of them were in uniform at one time or other during the war, almost all as commissioned officers. Many of these also served in civilian posts to advance the war effort when not in uniform. Most of the future Senators who were not members of the military forces either served on committees of intelligence or correspondence or on councils of safety, or as public officials in the political aspects of the conflict. None of the 94 was a loyalist, although at least 3—William Samuel Johnson of Connecticut and Paine Wingate and Samuel Livermore of New Hampshire—were lukewarm or neutral during the war.

Although none of these Senators except Philip Schuyler was a top military commander, a large number of them distinguished themselves during the war. Maryland in her stirring State song still celebrates two of her early Senators for their Revolutionary service—one as a civilian leader and the other as a conspicuous military hero:

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[3] The biographical information concerning Senators serving in 1958 has been compiled from the biographical entries in the *Congressional Directory*, 85th Cong., 2d sess. (Washington, D.C.: Government Printing Office. 1958), pp. 3–176.

[4] *Senate Journal*, 1st Cong., 1st sess., Apr. 21, 1789, p. 17.

> Remember Carroll's sacred trust,
> Remember Howard's warlike thrust,
> And all thy slumb'rers with the just,
> Maryland, my Maryland.

Charles Carroll of Carrollton, a signer of the Declaration of Independence, was a leader of the patriot cause in Maryland from the very beginning, served in the Continental Congress, headed a commission to Canada, and was a member of the board of war. John Eager Howard was a dashing officer who fought with valor at White Plains, Germantown, Monmouth, Camden, Cowpens, Guilford's Court House, Hobkirk's Hill, and Eutaw Springs.

Many others may be cited at random. New Hampshire's John Langdon, first President pro tempore of the Senate, did yeoman service in securing military supplies, built ships of war, organized and financed Stark's expedition against Burgoyne, and led a body of militia in combat. William North of New York served as aide-de-camp to Baron von Steuben, accompanied that officer on his campaigns, and so won his confidence that he was adopted as his own son. Nathaniel Chipman of Vermont was promoted to first lieutenant for his service during that dreadful winter at Valley Forge. New Jersey's Philemon Dickinson, as commander in chief of his State's militia, led several important military operations and was praised by Generals Washington and Greene for his skill and courage. Joseph Anderson of Tennessee, a Continental captain at 20, served as an officer in Sullivan's expedition against the Iroquois and at the siege of Yorktown. Jacob Read of South Carolina was a captain of the Charleston militia and a prisoner of war in the hands of the British. Josiah Tattnall of Georgia at 18 ran away from his loyalist family in England to join Greene's army. James Monroe of Virginia was a veteran of the battles of Harlem, White Plains, Trenton (where he was wounded), Brandywine, Germantown, and Monmouth. John Brown of Kentucky, while a student at Princeton, joined the American forces as they retreated through the city, and later served under Lafayette. Henry Latimer of Delaware was a surgeon of the "flying hospital" which cared for American soldiers wounded on the field. James Hillhouse of Connecticut served as a combat officer and later was active in recruiting men in his State for the Continental Army. George Cabot of Massachusetts helped both himself and the patriot cause as member of a firm which owned 40 privateers and letter-of-marque ships. Joseph Stanton, Jr., of Rhode Island, a veteran of the French and Indian War, served as a member of the committee of safety in his State and as colonel in the Revolutionary Army.

Not the least of these soldier-Senators was North Carolina's Jesse Franklin, a soldier at 17, hero of King's Mountain and Guilford's Court House, who was so hated and feared by the loyalists of the frontier that when he was captured he was hanged by his own bridle, only to have it break and allow him to escape.

In 1958, 61 of the 96 Senators were war veterans. Although the number of veterans in the Senate at any given time depends, of course, on the proximity of a war in point of time, it is clear that military service has always been of advantage in achieving election to the Senate.

College Men in the Senate

Evaluation of the educational background of these early Senators is equally difficult because of the difference in standards and curriculums, and because the available information is again incomplete and contradictory. However, it appears that 57 of these first 94 Senators, or approximately 60 percent, were either college graduates or had had some college work. Many of them left college to enter the Revolutionary military forces. The percentage of college men would have been higher were it not for the fact that 23 of these Senators studied law in private law offices without previous college preparation, which was not required in that day.

Sixteen of the ninety-four appear to have attended Princeton, 12 Yale, 10 Harvard, 8 William and Mary, and 7 the University of Pennsylvania, with 1 or 2 having attended Brown, Dartmouth, Rutgers, or King's (Columbia).[5] Several obtained part of their education in Europe. Henry Latimer of Delaware studied medicine at Edinburgh; William Hindman—and possibly John Henry—of Maryland and Jacob Read of South Carolina studied law in London. Charles Carroll of Maryland pursued legal and other studies at Roman Catholic colleges in French Flanders and France as well as in England. William Grayson of Virginia and Ralph Izard of South Carolina are said to have studied at Oxford and Cambridge, respectively, but apparently this has not been proved by the records of those institutions.

Considering the conditions of the time, especially the fact that only a small percentage of the total population of that day attended college, these early Senators enjoyed an unusually solid educational background.[6]

Lawyer, Merchant, Planter

With respect to occupation, the great majority in that day, as in this, were lawyers by profession. Of the first 94 Senators, 65 (69 percent) were lawyers, including 2 who were admitted to the bar but never practiced. This compares to approximately 60 percent of those serving in 1958. However, in the earlier day, lawyers probably had more outside business interests than at the present time. A large number who were lawyers by profession owned large landed estates and gave much of their time and interest to agricultural pursuits. Thus in occupational classification they can hardly be distinguished from the dozen or so who might be listed as planters or estate owners by occupation but who had constantly given a considerable portion of their time to public affairs. Another seven or eight might be listed as "business executives" by occupation, but by the same token these can hardly be distinguished from the lawyers and estate owners who were involved in a wide variety of mercantile and other business enterprises.

For instance, six of the eight Senators who represented Virginia during the period are listed as lawyers, but all of them were closely identified with the plantation-owning element. Senators from New England and the Middle States were often lawyers who not only owned agricultural estates but invested time and money in mercantile and manufacturing enterprises—men like Elijah Paine of Vermont, who was not only a lawyer but a farmer and owner of a cloth factory and saw and grist mills.

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[5] Where a future Senator studied at two different colleges, both are included.

These figures are somewhat misleading—the figure for Princeton is so high partly because New Jersey sent 10 different men to the Senate during this period—more than any other State. Eight Senators represented Virginia during the period, six of whom attended William and Mary. Richard Henry Lee apparently did not attend college, but attended Wakefield Academy in England.

[6] Of the 96 Senators serving in 1958, 83 (86 percent) enjoy a college education, almost all of these having had 4 or more years of college work.

In common with so many other men of affairs of the time, some of these Senators were land speculators on a large scale—especially Morris and Bingham of Pennsylvania and Dayton of New Jersey. Morris is said to have controlled 6 million acres of land at one time.[7] In contrast to speculation in securities, these land deals were generally not stigmatized by the Republicans in the party warfare of the period, possibly because some of their own number, particularly westerners, were themselves involved on a greater or lesser scale. Among these speculating Senators—but not typical of them—was James Gunn of Georgia, whom Beveridge described as the field marshal of the Georgia land frauds, and who, when the Yazoo land bill was before the legislature, strode about the Georgia capital armed with a loaded whip, commending those who favored the bill, abusing those who opposed it.[8]

Critics occasionally sniped at the Senate on the ground that it contained too many lawyers and did not mirror the occupational pattern of the country. They claimed that the "landed interest," which comprised about nine-tenths of the population, was badly underrepresented—as, indeed, it was.[9] In 1794, the notoriously hypercritical *Aurora* denounced lawyers in Congress as "machines of precedent" who could reach no decision on national questions before "Vattel, Grotius, Bynkerschock, or Puffendorf" had first been consulted.[10] Six years later, when a bankruptcy bill was before the Senate, the *Aurora* claimed that the lawyers in that body pushed the bill through in the hope that it would yield "handsome pickings" to a "flock of legal harpies." [11] On the other hand, lawyers in legislative bodies were defended on the basis that they—not being identified with any one economic interest such as farming, manufacturing, or trade—would seek to harmonize these interests for the public good.[12]

The partisan nature of attacks on the Senate's occupational configuration was made evident during the dispute over the Jay Treaty, when Senators were attacked—not now for overrepresenting the commercial interests, but for knowing nothing about the practical aspects of trade.[13] On the whole, these early Senators had remarkably wide experience, not only in the legal field but in the practical economics of the period—agricultural, manufacturing, and mercantile.[14]

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[7] Louis M. Hacker, *Triumph of American Capitalism* (New York: Simon & Schuster, 1940), p. 211.

[8] Albert J. Beveridge, *Life of John Marshall* (Boston: Houghton Mifflin Co., 1916–19), III, 549–550.

[9] *National Gazette*, Oct. 10, 1792.

[10] *Aurora*, Apr. 19, 1794.

[11] *Ibid.*, Apr. 3, 1800.

[12] *Gazette of the United States*, Dec. 18, 1790, from an article in the *Independent Chronicle* (Boston).

[13] *Aurora*, July 17 and Oct. 14, 1795.

[14] In the earlier period, Senators generally continued their private business and agricultural pursuits while serving in the Senate. Today, with congressional service requiring full-time attention, Members of Congress find it more difficult to divide their time between public and private affairs. William Samuel Johnson of Connecticut occupied the presidency of Columbia College during his entire Senate service, 1789 to 1791.

"The Rich Man's Club"

In view of the fact that the framers of the Constitution believed that the Senate ought to "represent the wealth of the country" and the fact that the Senate in a later period became known as a "rich man's club," it is natural to ask whether or not men of wealth predominated in the Senate during this early, formative period. The answer is a definite "yes." In fact, the Senate roll sounded almost like a "Who's Who" of the wealthy and socially prominent of the day. Not only were the majority of these first 94 Senators men of handsome fortune, but this practice of sending wealthy individuals to the Senate extended to all parts of the country—New England, the Middle States, the South, and West—and to both parties, Federalist and Republican. The distinction that Federalist members generally drew their income from finance, commerce, and manufacture, while the Republicans derived theirs from agriculture, has some validity but is an overgeneralization, since many of the Federalists from New England and the Middle States owned vast landed estates. However, it is true that the prosperity of the landed interest in these sections was more closely tied to manufacturing and commerce than was the case in the Republican South.

When the National Capital was located at Philadelphia, the mansions of two successive Pennsylvania Senators—Robert Morris' "Lansdown" and William Bingham's "Mansion House"—were the scenes of some of the most lavish entertainment in America. Morris, who gained fame as the financier of the Revolution, in association with the Willing family and others, conducted a wide and lucrative shipping and mercantile business, was a heavy subscriber to the Bank of North America, and as a partner in the North American Land Co. held millions of acres of land in Genesee County, N.Y., and elsewhere. Three years after declining a second Senate term, failure of certain land speculations brought him to debtors' prison, but while a Member of the Senate he was considered one of the financial giants of his time.

Senator William Bingham had made a fortune in war profiteering and engaged in trade, finance, and land speculation on a huge scale. His wife, the former Ann Willing, daughter of Morris' associate Thomas Willing, was the undisputed queen of American "society" with a court all her own. The Bingham residence on Third and Spruce Streets in Philadelphia was considered the most "distinguished" in the city and was the very center of the "Republican Court." The Binghams' lavishness in residence and equipage contrasted sharply with the manner in which even the President lived.[15]

On the other hand, when Paine Wingate, accustomed to a comfortable but somewhat modest living in New Hampshire, arrived in the Senate, he was at first somewhat owerawed by Maryland's Charles Carroll of Carrollton, whom he described as being, by reputation, the "richest man in America, worth half a million sterling." He was subsequently delighted to find him "as plain in his dress and manners, and as easy of access, as any man whatsoever."[16]

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[15] Rufus Wilmot Griswold, *Republican Court* (New York: D. Appleton & Co., 1867), pp. 291–293, 301, 327. See also Margaret L. Brown, "Mr. and Mrs. William Bingham of Philadelphia," *Pennsylvania Magazine of History & Biography*, LXI (July 1937), 286–324.

[16] Letter, Wingate to the Reverend Dr. Jeremiah Belknap, May 12, 1789, Wingate, *op. cit.*, II, 314.

Senator Philip Schuyler, archetype of the aristocracy of upper New York State, owned thousands of valuable acres in the Mohawk and Hudson Valleys, lumber, flax, and grist mills, as well as investments in banks and transportation enterprises, and Government securities. His Albany mansion was the center of the high society of that area.

Although the presence of Morris, Bingham, Carroll, and Schuyler offers perhaps the most emphatic proof of the financial eminence of the Senate's personnel during this period, the fortunes of scores of others add their testimony. Jonathan Mason of Massachusetts made a fortune in Boston real estate. Richard Stockton of New Jersey owned tremendous tracts of land in Oneida County, N.Y., and in North Carolina, and later added to his estate through steamboat and canal ventures. Charles Pinckney, Republican leader in the Senate and idol of the Jeffersonian press, was the scion of a wealthy plantation-owning family and married a daughter of merchant prince Henry Laurens. James Jackson of Georgia, bitter foe of the Yazoo speculators, was reputed to be earning £3,000 a year by 1789 through his law practice, an exceedingly handsome income for that day. Virginia's John Taylor of Caroline, outstanding spokesman of agrarian liberalism, owned several plantations and added to his estates by marrying the daughter of a prosperous North Carolina planter and lawyer. Even the western Members—men like Andrew Jackson of Tennessee—though their affairs were often sadly disordered by the vagaries of large-scale land speculations—represented the wealthy element of their States.

These are only typical examples. Similar descriptions would fit the economic standing of the majority of the 94 men who served in the Senate during its first 12 years.

THE SOCIAL REGISTER

The Senate roll during the period 1789 to 1801 sounded not only like a "Who's Who" among the wealthy families of the post-Revolutionary days, but also like several pages from the "social register" of the time. A significantly large proportion of the 94—Federalists and Republicans alike—were members of families prominent in their areas from early colonial times.

For instance, William Bradford of Rhode Island was the great-great-grandson of the second governor of Plymouth. George Cabot's surname would probably occur to one first in listing the oldest and most patrician families of the Bay State, but the list would have to include those of other early Senators—such as Caleb Strong, whose family arrived in Massachusetts in 1630, and Theodore Sedgwick, whose forebears arrived in 1635. Aaron Burr of New York was a grandson of the great Jonathan Edwards and son of the president of Princeton. Gouverneur Morris, who championed the cause of an aristocratic Senate at the Philadelphia convention, prided himself on his own aristocratic connections and was a great cultivator of polite society. John Armstrong, also of New York, married a daughter of the Livingston dynasty.

Among the southerners, Richard Henry Lee, though an ardent anti-Federalist, was an aristocrat of Virginia aristocrats. Though they constantly tried to pin the "aristocrat" label on their opponents, all the Virginians were members of the Old Dominion gentry. Ralph Izard of South Carolina was a member of one of the oldest and wealthiest families of his State. Even Senators from Tennessee and Kentucky, frontiersmen though they were, were members of socially distinguished families. The turbulent, self-willed William Cocke, who at 65 enlisted in the Creek War as a private under Jackson, was a descendant of a family prominent in Virginia since 1628. Kentucky's John Brown was also of prominent Old Dominion ancestry and was related to the Clays and Breckenridges.

At least 3 of these first 94 Senators could claim descent from titled British families. William Blount, expelled from the Senate for his part in the Spanish conspiracy, was a great-great-grandson of Sir Walter Blount. John Rutherfurd of New Jersey was a grandson of Sir John Rutherfurd. Pierce Butler of South Carolina was a son of Sir Richard Butler, baronet, Member of Parliament for County Carlow, Ireland—a connection of which he was inordinately proud and which made him vulnerable to the gibes of his political opponents.

But not all of these Senators, even those of distinguished family, were born to a life of ease. Many of them had by their own exertions climbed up the financial ladder from the very bottom.

Oliver Ellsworth, member of an eminent family which came to Connecticut in 1650, and who built up a lucrative law practice, was so penniless when he began his practice that he could not afford a horse and had to walk 10 miles each way on the days he attended court. Roger Sherman, also of Connecticut, a member of a family which arrived in Massachusetts in 1636, began his adult life as a shoemaker and never lost a certain rusticity of manner—although he acquired considerable property and distrusted participation of the "common people" in political affairs. Federalist leader Theodore Sedgwick, member of a notable family which arrived in Massachusetts in 1635, was the son of a storekeeper. Despite his humble background he became the leading lawyer of the western part of his State, and was described as aristocratic and overbearing toward his inferiors—although keeping open house to rich and poor. Richard Bassett of Delaware, who inherited a considerable estate from a relative, was a son of a tavernkeeper.

Andrew Jackson, born in a frontier log cabin, was a saddler's apprentice at 14. Timothy Bloodworth of North Carolina obtained a meager education at his own expense, became a teacher and jack-of-all-trades, made muskets and bayonets for the patriot army during the Revolution, became a Republican leader of his State, and by the time of his death was known as a "philanthropist." Georgia's William Few was a child of the southern frontier who early became inured to hardship and obtained only the rudiments of a preparatory education from itinerant teachers. Facing legal and financial difficulties in North Carolina, his family moved to Georgia, where the future Senator became a successful lawyer and planter.

On the whole, it can be said that even those Senators who began life under modest circumstances were, by the time they reached the Senate, usually closely identified with the wealthy and the socially prominent. By temperament, economic interest, and social class the first Senators were admirably suited for the duty which many of the constitutional fathers believed the Senate should perform—that of representing the wealth of the Nation and checking whatever "radical" tendencies the House of Representatives might display. The minority who espoused Jeffersonian democracy did so because of sectional economic interest or inner conviction—not because they themselves were identified with the common man of city or farm.

A Council of Young Elders

Among the constitutional provisions designed by the framers to give the Senate wisdom and experience was that requiring Senators to be 30 years of age, compared to a minimum of 25 for House Members. Thirty years seems a rather youthful age for a member of a "council of elders," but in reading the debates of the Constitutional Convention and the records of the subsequent discussions, one gathers the impression that the State legislatures were expected to choose Senators of far more advanced years than the constitutional minimum. A natural question thus comes to mind: Did they?

The answer is: Not to the extent that might be expected. The average age of the men who entered the Senate in its first year was a little less than 48 years, ranging from 34 (Rufus King) to 61 (William Samuel Johnson). Over the 12-year period from 1789 to 1801, the average age of the Senators upon beginning their senatorial duties was about 45 years.

The tendency during the years following 1789 was to elect younger men to the Senate. In fact, the average age of the freshman Senators who began their service 10 years later was less than 42 years, making the average in 1799, including Senators who had already served several years, only 45 years.

At the present time the Senate comes nearer to being a council of "elders" than during this early period. The average age of the Senators at the beginning of the 2d session of the 85th Congress in January 1958 was 59 years. The average age of these Senators when they began their Senate service was 50 years.[17]

Many of the men elected during the period 1789 to 1800 were barely above the constitutional minimum. John Rutherfurd of New Jersey and Andrew Jackson of Tennessee were only a few months past 30 when they began their Senate service. James Ross of Pennsylvania was 31; James Monroe of Virginia, Ray Greene of Rhode Island, and Josiah Tattnall of Georgia were 32; Stevens T. Mason of Virginia, Rufus King of New York, and John Vining of Delaware were 34. Six others were 35.[18]

Place of Birth

Most of these first 94 Senators—54 to be exact—were born in the Colonies which they afterward represented as States. All eight of the Virginians, all seven of the Marylanders, six of the seven Connecticut men, seven of the eight Massachusetts Members, and four of the five

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[17] One of the reasons for the higher average age of Senators today is the tendency toward longer Senate service. As will be shown in ch. V below, frequent resignations resulted in a rapid turnover of Senate personnel in the early period. In addition, the longer overall life expectancy in the United States today must be taken into consideration.

[18] The *Aurora* of Apr. 23, 1800, claimed that an unnamed individual was serving in the Senate at that time who was only in his 28th year, in clear violation of the Constitution. However, the available records do not bear out this contention.

There is some question concerning the year of birth of William H. Wells of Delaware. The *Biographical Congressional Directory* gives it as 1769, the biographical cyclopedias as "about 1760."

South Carolinians represented the States of their birth. All three of the Kentuckians were born in the parent State of Virginia. However, none of the Vermont Senators and only one of six Georgians, one of five Tennesseeans, and two of nine New Yorkers were identified by birth with the States they represented.

Six of these early Senators were born outside the United States, all of them in the British Isles. However, only one of these six arrived in America after becoming of age—Pierce Butler of South Carolina, who was born in Ireland and came to America as an officer in the British Army, a commission which he resigned before the Revolution. Three were born in England: John Laurance of New York arrived in America when he was 17, the fiery James Jackson of Georgia at 15, and Robert Morris of Pennsylvania at 13. Samuel Johnston of North Carolina came from Scotland at the age of three and William Paterson of New Jersey from Ireland when he was two.

The following table shows the birthplace of all 94:

Connecticut	Connecticut 6, Massachusetts 1
Delaware	Delaware 2, Maryland 3, New Jersey 1
Georgia	Georgia 1, Virginia 2, Maryland 1, Connecticut 1, England 1
Kentucky	Virginia 3
Maryland	Maryland 6
Massachusetts	Massachusetts 7, Connecticut 1
New Hampshire	New Hampshire 1, Massachusetts 2
New Jersey	New Jersey 6, Maryland 1, New York 1, Pennsylvania 1, Ireland 1
New York	New York 2, Massachusetts (Maine) 2, New Jersey 1, Pennsylvania 1, Connecticut 2, England 1
North Carolina	North Carolina 2, New Jersey 1, Virginia 1, Scotland 1
Pennsylvania	Pennsylvania 3, England 1
Rhode Island	Rhode Island 2, Massachusetts 2
South Carolina	South Carolina 4, Ireland 1
Tennessee	North Carolina 1, Virginia 2, South Carolina 1, Pennsylvania 1
Vermont	Connecticut 3, Massachusetts 1, New Jersey 1
Virginia	Virginia 8

A number of different conclusions may be drawn from these figures. The sectional conflict of the period may have been accentuated by the fact that none of the New England or Middle States Members was born south of the Potomac while only three of the southerners were born in Colonies north of the Mason-Dixon line. Some States, such as Georgia and Tennessee—were still in a frontier stage with the resultant presence of many residents from outside their borders. Other States had a more stable population.

The States' rights principle may have owed some of its strength in Virginia to the fact that so many of its leaders had been identified with the Old Dominion from their birth. Even in this period many of them referred to their State as "my country." However, applying the same principle to other States would put such States as Massachusetts and Connecticut also in the States' rights column at this time, which would lead one into difficulty.

At any rate, the figures show that then, as now, long identification with his State was of advantage to a senatorial candidate in achieving election.

JUDGING THE QUALIFICATIONS OF MEMBERS

The Constitution provides (art. I, sec. 5) that each House of Congress "shall be the Judge of the Elections, Returns and Qualifications of its own Members" and gives each House authority to expel a Member for misconduct. During its first 12 years, the Senate had opportunity to utilize each of these powers, although the manner in which it did so has not escaped criticism.

ALBERT GALLATIN

Denial of a Senate seat to Albert Gallatin was based on the constitutional provision (art. I, sec. 3) that "no Person shall be a Senator who shall not have * * * been nine Years a Citizen of the United States * * *." Because this story has been told in detail by others, only the principal facts affecting the Senate itself will be discussed here.[19]

Gallatin was elected to the U.S. Senate on February 28, 1793, after the Pennsylvania Legislature finally broke a 2-year impasse over the question of whether Senators should be elected by the two houses sitting in joint session or by concurrent vote. When his name was first suggested for the office, Gallatin himself expressed some doubt as to whether he had been a citizen of Pennsylvania long enough to qualify. However, after his friends convinced him that he was the only "person of truly Republican principles" who had a chance of election, and after carefully rereading the Constitution, he changed his mind.

Gallatin took the oath of office as Senator on the first day of the following session, December 2, 1793. On the same day, Vice President Adams laid before the Senate a petition signed by Conrad Laub and 18 other residents of York, Pa., protesting his election on the ground that he had not been a citizen the required 9 years. Nine days later this petition was referred to an all-Federalist committee of five members, headed by John Rutherfurd of New Jersey.

While the Senate studied the question, Gallatin was allowed to retain his seat. A financial wizard second only to Hamilton, he immediately elated the enemies and irritated the friends of the Secretary by utilizing his position to call upon the Treasury for specific and detailed information concerning its operations.

The Rutherfurd committee reported on December 31 that Gallatin had not been a citizen for 9 years, as required by the Constitution. After debating the report for several days the Senate referred the question to a new, seven-man "committee of elections," to which the Laub petition was referred and which was authorized to send for persons and papers. This was a bipartisan committee; its chairman, Stephen R. Bradley of Vermont, and two other members could be expected to be friendly to Gallatin. During a month's investigation, the committee listened to the sworn testimony of witnesses. Given opportunity to produce evidence in his own behalf, Gallatin maintained that there was not sufficient information in the Laub petition to justify vacating his seat and that he had the right to have the question decided by the Senate itself. In the meantime, he did not wish to go to the trouble and expense of collecting evidence at great distance. He did, however, provide a statement of the chief events of his life, with detailed information for the years he had been in the United States. The committee reported that Gallatin's reasons for not presenting evidence at the committee stage of the inquiry were insufficient and that the evidence produced by the petitioners made it incumbent on Gallatin to prove that he actually had become a citizen.

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[19] This discussion is based principally on Raymond Walters, Jr., *Albert Gallatin, Jeffersonian Financier and Diplomat* (New York: Macmillan Co., 1957), pp. 50–51, 59–63.

From February 20 to 28, the Senate itself—sitting for the first time in open session—listened to the arguments of both sides. William Lewis, Quaker Federalist from Pennsylvania, served as counsel for Laub and the other petitioners in presenting the case against Gallatin's eligibility. Gallatin served as counsel for himself. Lewis' chief tactic was to place on Gallatin the burden of proving when and how he had become a citizen. He pointed out that in Virginia, where Gallatin had resided for 2 months, the Genevan had taken only one oath of citizenship—before a magistrate, not in a court—while Virginia law required an alien to take two oaths in court and to be a resident for 2 years. He closed his argument by remarking that in one ancient republic death was the penalty for aliens intermeddling in politics and warning the Senators that a loose interpretation of the citizenship requirement would endanger their own Republic.[20]

In his own defense, Gallatin maintained that Lewis' doctrine would not only deprive him of his seat, but would cast doubt on the citizenship of other immigrants. The true policy of the Nation should be to make citizenship as easy as possible to encourage increase in the population. One of the grievances against George III had been his effort to discourage growth of the population by obstructing the naturalization of foreigners. With regard to his own case, he pointed out that he had been a resident of the United States continually since 1780 and had served actively in the Revolution. With independence, the inhabitants of the States became citizens of every State reciprocally and so continued until such time as the States made laws of their own respecting naturalization. He endeavored to clinch his case by pointing out that the Articles of Confederation in 1781 provided that the "free *inhabitants*" were to have all privileges and immunities of "free citizens" in the several States (art. V).

Both sides confined themselves to the question of whether or not Gallatin was a citizen of the United States. However, it is quite evident that other than technical arguments influenced the Senators. By three identical votes of 14 to 12, the Senate decided that the Pennsylvanian was not entitled to a seat. These votes were strictly partisan—every Republican had decided Gallatin was duly qualified, every Federalist had decided that he was not.[21]

Ever since the Senate Federalists deprived Gallatin of his seat, their action has been interpreted by unfriendly observers as a "plot" to rid the Senate of its most effective critic of the Hamiltonian system. That the votes of Hamilton's supporters were motivated by partisan considerations can be regarded as certain. However, these writers have ignored the fact that the crucial issue actually was whether or not Gallatin had satisfied the citizenship requirement. This was an exceedingly complicated and technical question, as the arguments on both sides so thoroughly reveal. The Senators, Federalist and Republican alike, apparently believed that the facts and arguments on both sides were so inconclusive that they were free to vote according to their partisan preferences. In the absence of conclusive proof that Gallatin actually had been a citizen of the United States for 9 years, the Federalists were no more to blame for voting their party preferences than were the Republicans; it merely happened that they were in the majority. If the Republicans had been in the majority and had allowed Gallatin to retain his seat in the absence of conclusive proof that he actually had satisfied the citizenship requirement, they would have exposed themselves to justifiable censure on the ground that they foisted on the Senate an ineligible person to promote their partisan advantage.

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[20] Senate action in the *Gallatin* case is described in *Annals*, 3d Cong., 1st sess., Dec. 2, 1793 to Dec. 28, 1793, pp. 9–61, and *Senate Journal*, 3d Cong., 1st sess., for the same dates, pp. 4–62. (The arguments are also discussed in notes of Senator Rufus King, Charles R. King (ed.), *Life and Correspondence of Rufus King* (New York: G. P. Putnam's Sons, 1894–1900), I, 528–539.

[21] It is recognized that use of the term "Federalist" and "Republican" with respect to events in 1793–94 is somewhat premature. The terms are used here to designate general orientation. See ch. xvi, *infra*.

For the votes on Gallatin's eligibility, see *Annals*, 3d Cong., 1st sess., Feb. 28, 1794, pp. 61–62.

Failure of Gallatin to retain his Senate seat was undoubtedly a blessing in disguise to the Republicans. He was subsequently elected to the Lower House, where he became a tower of strength to the active and energetic Republican forces. In the Senate he would have been doomed to relative ineffectiveness as a member of a group which was always in the minority.

Narrowly partisan though the Senate's action was in this case, it had one far-reaching result. To avoid the charge of conducting "star chamber" proceedings, the Senate opened its doors to the public during discussion of the case. This decision apparently spurred the movement for a general policy of public sessions, for the day the Gallatin discussion reached the floor, the Senate decided to open its legislative sessions to the public after the current session and as soon as a suitable gallery could be provided.[22]

KENSEY JOHNS

A month after their unsuccessful effort to keep Albert Gallatin in the Senate, the Republicans gained a measure of revenge by being chiefly instrumental in obtaining an investigation of the credentials of Kensey Johns, a Federalist appointed by Governor Joshua Clayton of Delaware to fill the vacancy caused by the resignation of Senator George Read. This investigation was authorized by a 13-to-12 vote, the "yea" votes being substantially those of the Senators who had supported Gallatin a month before, reinforced by two volunteers from the Federalist camp.[23]

Only a brief investigation was necessary to bring forth the pertinent facts. George Read had resigned his Senate seat on September 18, 1793. The Delaware Legislature in its January 1794 session had failed to elect a successor. Unwilling to see his State underrepresented in the Senate, Governor Clayton on March 19, 1794, had appointed Johns to fill the vacancy.

Upon comparing these facts with the constitutional provision regarding gubernatorial appointments to fill vacancies, most of the

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[22] See ch. xiv, *infra*.

[23] For the Senate proceedings in the *Johns* case, see *Senate Journal*, 3d Cong., 1st sess., Mar. 24 to 28, 1794, pp. 89–97.

Federalists recognized that a defense of the Johns appointment would be untenable. The Constitution provides (art. I, sec. 3) that—

> if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

The Senate decided, by a 20-to-7 vote, that since a session of the Delaware legislature had intervened between the resignation and the appointment, giving the legislature full opportunity to fill the vacancy in the regular manner, the Governor's appointment was not valid and Johns was not entitled to a seat. The vote was partisan to the extent that all seven negative votes were those of Federalists and all the Republicans voted affirmatively. However, eight Federalists were convinced that Johns' appointment was illegal and joined the Republicans in denying him the seat.

The Read vacancy was not filled until February 7, 1795, when Henry Latimer assumed office. The year-and-a-half failure of the Federalist majority in Delaware to fill the vacancy greatly disgusted Federalist leaders, who, during a time of mounting partisan strife felt they badly needed an "able, active and attentive" man to fill Read's place.[24]

HUMPHREY MARSHALL

In March 1796 the Senate spent several days discussing a letter from the Governor of Kentucky and a memorial of that State's House delegation (acting on behalf of the Kentucky Legislature) requesting the Senate to investigate informal charges by two judges of the Kentucky Court of Appeals to the effect that Senator Humphrey Marshall of Kentucky had committed perjury in a Kentucky lawsuit. According to these charges, this alleged crime had been committed 18 months before Marshall was chosen Senator. The charges were apparently part of a bitter personal feud between these judges and Senator Marshall, who was a Federalist lone wolf in a strongly Republican State.

Marshall himself desired the Senate to investigate the charges since he found himself in the unfortunate situation of having charges leveled against him publicly with no opportunity to reply to them in court and thereby prove them false. However, the Senate declined to investigate the charges, by a 16-to-8 vote adopting a committee report noting that no person had appeared to prosecute Marshall, no official evidence against him had been presented, nor had the Kentucky Legislature indicated that any would be presented. Neither had the legislature requested the Representatives or the other Kentucky Senator to prosecute Marshall.

The report further held that in cases of this kind, no person can be held for an infamous crime except on a presentment or indictment of a grand jury, in which case the accused should be tried by a jury in the State and district where the alleged crime was committed. Unless a person were so convicted, both Constitution and common law presumed him innocent. Finally, since the Constitution did not give jurisdiction to the Senate, even the assent of the accused could not give it.

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[24] Letter, George Read to Governor Clayton, Mar. 11, 1794, William Thompson Read (ed), *Life and Correspondence of George Read* (Philadelphia: J. B. Lippincott & Co., 1870), p. 560. See also *ibid.*, pp. 552–562, *passim*.

The case was hardly a momentous one. The Senate was not asked officially to try Marshall for the crime of perjury, as the Senate committee report seemed to assume, but to investigate the charges with the view of determining whether Marshall were worthy of retaining his Senate seat. However, since the way had been open for Marshall's opponents to institute legal proceedings against him if he were, indeed, guilty of a crime, the Senate apparently concluded that the informal charges against him were a bit of Kentucky political maneuvering to which it ought not give too serious attention.[25]

WILLIAM BLOUNT

Infinitely more serious was the case of Senator William Blount of Tennessee, whose activities on the frontier not only illustrated a type of machination to which a certain class of westerner was addicted, but also led to one of the rare impeachment trials in congressional history. Since a detailed discussion of the Blount conspiracy would lead this study far afield from its subject, only those factors which directly involve the Senate will be emphasized here.

The case involved (1) the Senate's power to expel a Member for misconduct, as provided in article I, section 5, of the Constitution; (2) the question of the impeachability of a Member of Congress, and (3) Federalist-Republican Party politics. The course adopted by the Senate before the actual impeachment trial prevented this case from being a clear precedent on the second of these questions.

The basic facts were briefly these: On July 3, 1797, President John Adams sent to both Houses of Congress a special message together with a letter signed "William Blount" involving a conspiracy to deliver New Orleans from Spain to Great Britain and to incite the Creeks and Cherokees to assist the British in conquering the Spanish territory of Louisiana. The President had previously obtained an opinion from the Attorney General and others to the effect that the letter was evidence of a crime and that Blount, being a Senator, was liable to impeachment under the provisions of the Constitution.

Both Houses of Congress immediately appointed committees to consider the question. On July 7 the House, having determined through witnesses that the handwriting on the letter was Blount's and having concluded that a Senator is impeachable, instructed the chairman of its committee to go to the Senate and (1) at the bar thereof impeach Blount of high crimes and misdemeanors and inform the Senate that in due time the House would present particular impeachment articles, and (2) demand that the Senate "sequester" Blount from his seat and also insure his appearance to answer the impeachment charges. In the House debate, it was declared that the words "sequester" and "suspend" were synonymous.[26] This procedure conformed precisely to English parliamentary practice, substituting the House of Representatives for the House of Commons and the Senate for the House of Lords.[27]

In the meantime, the Senate had acted equally expeditiously against Blount. A committee consisting of James Ross, Richard Stockton,

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[25] *Senate Journal,* 4th Cong., 1st sess., Mar. 17 to 21, 1796, pp. 111–128; *Aurora,* Jan. 30 and Feb. 1, 1796.

[26] *Annals,* 5th Cong., 1st sess., July 7, 1797, p. 461.

[27] See *Jefferson's Manual,* sec. LIII, "Impeachment." This manual has been published in book form in various editions and is also included in the *Senate Manual* published from time to time; see ch. xii, *infra.*

John Henry, Theodore Sedgwick, and Jacob Read reported in favor of expulsion. Blount, who had absented himself from the Senate and could not be found by the Doorkeeper, eventually reappeared. Having been allowed counsel, he named Jared Ingersoll and Alexander J. Dallas, two prominent Republicans, who appeared at the appointed time on July 7. Asked whether or not he had written the incriminating letter, Blount refused to answer.

While the Senate was considering the question of allowing Blount's counsel more time to prepare their case, Chairman Sitgreaves of the House committee appeared with the message from the House impeaching Blount and demanding his sequestration. The Senate invited all the House Members to attend the Senate during action on their message, and then in the presence of both Houses proceeded to act against Blount.

Upon adoption of a motion requiring that Blount be taken into custody until he furnished "recognizance," with sureties, to appear and answer such articles as might be exhibited against him, the Tennessee Senator named his brother, Representative Thomas Blount, and Senator Pierce Butler of South Carolina. The next day, July 8, 1797, Blount was given opportunity to reply to the report of the committee, which he did through his counsel, Ingersoll and Dallas.

After rejecting, 19 to 7, a motion to postpone until the next session the committee report calling for expulsion, the Senate forthwith adopted the report 25 to 1. The only negative vote was that of Senator Henry Tazewell of Virginia. Thereupon Blount was ordered taken into custody to answer the Representatives' articles of impeachment. Instead of presenting himself to the Senate on July 10 as ordered, Blount violated the assurances he had made and fled to Tennessee.

It will thus be seen, as emphasized by Haynes, that the Senate in the same breath took measures to assure Blount's presence for trial on impeachment charges, and, asserting his guilt, expelled him from its membership. These contradictory actions were to cause the Senate a good deal of embarrassment when the impeachment case came up for trial.[28]

Congress adjourned on July 10. In the months that followed, Secretary of State Timothy Pickering and James Mathers, the Senate's messenger (acting as Sergeant at Arms), tried unsuccessfully to have Blount taken into custody. Blount's difficulties in the National Capital had no adverse effect on his popularity in his home State. Although an attempt to secure his reelection to the U.S. Senate failed, he was elected to the Tennessee State Senate and even elected speaker of that body. Mathers, while in Tennessee to apprehend Blount, was received courteously by the former Senator and by the State authorities, but was firmly assured that Blount could not be taken from Tennessee.[29]

Blount's trial before the Senate on the House's impeachment charges did not get underway until December 17, 1798, and then perforce in the absence of the defendant. The case became a lengthy constitutional argument between the House managers and Blount's counsel over the Senate's right to try the expelled Senator.

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[28] Haynes, *Senate of the U.S.*, *op. cit.*, II, 862–865, contains a good discussion of Blount's expulsion and impeachment trial. For details of the Blount conspiracy and subsequent events, see also Raymond W. Mueller, "The Blount Conspiracies" (unpublished M.A. thesis, Department of History, University of California, 1940).

For the proceedings in Congress, see *Annals*, 5th Cong., 1st sess. (Senate), July 4 to 10, 1797, pp. 34–45; (House), July 6 to 10, 1797, pp. 449–466; 5th Cong., 3d sess. (Senate) Dec. 20, 1798, pp. 2197–2198, Dec. 24, 1798, to Jan. 11, 1799, pp. 2247–2319.

[29] Mueller, *op. cit.*, p. 49, citing James G. M. Ramsey, *Annals of Tennessee to the End of the 18th Century*, p. 700.

The trial gave the Senate occasion to adopt its first rules governing impeachment trials. It was decided that all questions arising in the course of the trial should be decided behind closed doors. Votes were to be by "ayes" and "noes." When a question had been decided, the doors were to be reopened.

On January 11, 1799, the Senate decided by a 14-to-11 vote that:

> The court are of opinion that the matter alleged in the plea of the defendant is sufficient in law to show that this court ought not to hold jurisdiction of the said impeachment, and the said impeachment be dismissed.[30]

Blount's impeachment trial gave occasion for an elaborate debate concerning the office of Senator, especially the questions whether a Senator is a "civil officer" of the United States and the circumstances under which he may be prosecuted for alleged crimes.

Blount's defense, as presented by Ingersoll and Dallas, was based on four principal points:

(1) The Constitution guarantees that in all criminal prosecutions the accused shall have a speedy, public, and impartial jury trial in the State and district where the alleged crime was committed.

(2) Blount was not now a Senator and thus was not currently, nor had he been at any of the periods referred to in the articles of impeachment, an officer of the United States.

(3) Blount was not charged with misconduct in the execution of any civil office held under the United States nor abuse of any public trust.

(4) Courts of common law of criminal jurisdiction of the States where the offenses were allegedly committed were competent to handle the case if crimes or misdemeanors had been committed, which, however, was utterly denied.[31]

In the course of the argument, Dallas claimed that the Constitution (art. II, sec. 4), while stating that "the President, Vice President, and all civil Officers of the United States" are impeachable, excluded members of Congress since in a free government the legislative branch is superior to the executive and it is a rule of law that in naming inferior officers, superior officers are not affected. Also, by naming the executive, the legislative department, not being named, was excluded. He claimed that the provision regarding impeachments, being part of the article covering the executive branch and immediately connected with appointments and commissions, did not refer to Senators, who are not nominated or commissioned by the President. The Senate had certain executive duties, but according to Dallas the Constitution did not designate it as an executive body.

Dallas further pointed to article I, section 6, which prohibits a Senator or Representative from being appointed to certain "civil offices under the authority of the United States." Nothing could more strongly mark the difference, said he, between a *legislator* and an *officer*. He then pointed to article II, section 1, which also pointedly distinguishes between a legislator and a public officer by providing that—

> no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

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[30] *Annals*, 5th Cong., 3d sess., Jan. 11, 1799, p. 2319.

[31] *Ibid.*, Dec. 24, 1798, pp. 2247 ff.

Less legitimate than most of his other arguments were Dallas' claims that classing Senators as civil officers and making them subject to impeachment would enable the House to drive a Senator from his seat (ignoring the fact that approval of the Senate is necessary to convict); would arm the majority against the minority (an argument which would apply to all impeachments), and would render Senators judges in their own causes (a defendant would not have a vote).

The other defense counsel, Jared Ingersoll, attempted to reinforce the argument that a Senator is not an officer of the United States by pointing out that if a Senator dies or resigns during a recess of a State legislature, the executive of the State, not of the United States, fills the vacancy. Delaware had the same Senate representation as Massachusetts because Senators represent the sovereignty of the States.[32]

By adopting the motion to impeach Blount, the House of Representatives clearly took the stand that Senators are impeachable. Its managers in presenting the case against Blount were then faced with the task of convincing the upper Chamber of the correctness of this view and of refuting, argument by argument, the plea of the defense.

Countering the argument that the Constitution guaranteed Blount a jury trial in the district where the alleged crime was committed, Representative Bayard maintained that the express powers granted to the Senate as a court of impeachment superseded the general provisions regarding trial by jury.

The claim that Blount was not, and had not been, an officer of the United States, Bayard answered by stating that the Constitution does not say what officers are subject to impeachment and thus it was necessary to recur to the common law of England, which left the question of impeachability up to the discretion of Parliament.

To back the claim that a Senator is a civil officer of the United States, he pointed out that a Senator is a "legislator, an executive magistrate, and a judge." Alluding to Dallas' reference to article I, section 6, of the Constitution, Bayard maintained that the prohibition against Members of Congress holding certain "civil offices under the authority of the United States" was intended to create a barrier between the executive and legislative branches and therefore applied only to Executive appointments.

To protect the state, article I, section 3 provided that conviction in an impeachment trial disqualified an offender from holding any office of honor, trust, or profit under the United States. Could it be reasonably contended, asked the House managers, that such a protection would be raised against misconduct by the most mean and humble officer but not against a Senator? The same section prohibited officers of the United States from accepting, without congressional consent, any present or honor from a foreign nation. Could it be that this defense against seduction by foreign influence would not apply to a Senator, with all his great constitutional power?

The House managers further maintained that Blount's expulsion did not save him from impeachment. If it did, any offender could save himself from impeachment by resigning or by committing another offense leading to expulsion.

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[32] The defense arguments are contained in *ibid.*, Jan. 4 and 5, 1799, pp. 2262–2290. For a more detailed discussion of Senators as representatives of State sovereignty, see ch. x, *infra*.

With respect to the plea that Blount was not charged with committing an offense in the discharge of senatorial duties, the House managers declared that the Senate could decide this question for itself, but it was immaterial because the Constitution did not confine the impeachment power to punishment of official acts.

Finally, the House managers denied that common-law courts had jurisdiction to punish any offense Blount may have committed because there was no such court that could give judgment of disqualification. Anyway, the Constitution in article I, section 3, clause 7, provided that delinquents were liable both to punishment by impeachment and punishment by courts of common law.[33]

Failure of the Senate to convict Blount on the impeachment charges made very little practical difference to the former Senator, since the Constitution provides that—

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.

He had already been removed from office and since he died in 1800, ineligibility to hold future Federal office was of little moment.

On the other hand, by not specifying which of the defendant's arguments was most convincing, the Senate's resolution disclaiming jurisdiction failed to solve the constitutional problems involved, since it did not make clear whether the disclaimer was based on belief (1) that no Senator was liable to impeachment, or (2) that since Blount had been expelled he no longer held a "civil office" under the United States and was thus no longer impeachable.

No Senator has since been convicted under impeachment proceedings. Haynes was undoubtedly right when he stressed the greater utility of the power of each branch of Congress to censure or expel any of its own Members—a power not requiring the cooperation of the other branch or involving the delays and formalities (however salutary) of an impeachment trial.

During the years 1797 to 1799, however, the Blount case was the subject of considerable public agitation. It was partly a partisan issue. Republicans were inclined to picture the proceedings against Blount as a Federalist attempt to use the impeachment power to persecute a member of the opposition. Jefferson wrote Madison in 1798 that he saw in the impeachment proceedings a formidable weapon of the dominant party to get rid of a man considered dangerous to their program.[34] Bache of the *Aurora* claimed that the issue was the independence of each branch of Congress—if the House could impeach a Senator upon a "vague charge" and force the Senate to suspend a Senator without examination into the nature of the alleged crime, the Senate would be completely at the mercy of the other House and the Constitution and form of government of the United States would be "derelicted."[35]

Although the nature of Blount's offense was such that the Senate Republicans could not without great embarrassment vote against his expulsion, they did consistently oppose the impeachment proceedings. Tazewell of Virginia obtained the support of Andrew Jackson and Stevens T. Mason in a move to provide jury trials in cases of impeachment (in variance with the existing constitutional provision explicitly excluding impeachment cases from the guarantee of jury trial).[36] A few weeks later, when Senator Joseph Anderson of Tennessee moved to strike from an appropriation bill an item to cover the expenses of Blount's impeachment trial, five of seven affirmative votes were those of Republicans. When the final vote was taken on Blount's conviction, all the Republicans in the Senate voted "nay."[37] The Federalist *Gazette of the United States*, which urged Blount's conviction, stated categorically on January 21, 1799, that impeachment of Blount had been "quashed by the Democratic Party"—even though a number of Federalists also voted that the Senate did not have jurisdiction.[38]

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[33] These arguments of the House managers are contained in *Annals*, 5th Cong., 3d sess., Jan. 3, 1799, pp. 2248–2262.

[34] Jefferson to Madison, Feb. 15, 1798, Andrew A. Lipscomb and Albert Ellery Bergh (eds.), *The Writings of Thomas Jefferson* (Washington, D.C.: Thomas Jefferson Memorial Association, 1903), IX, 440. This edition of Jefferson's works is generally known as the "Memorial" edition.

[35] *Aurora*, July 8, 1797.

As a purely partisan issue, the case was embarrassing to both parties. The Federalists, whose principal strength had always been in the Senate, were put in the position of supporting a House move to impeach a Senator and thereby minimizing the independence of the upper Chamber. The Republicans, on the other hand, were not only put in the position of defending the independence of the arch-center of Federalism but of defending a man who had conspired to advance the interests of Great Britain, the alleged "patron nation" of the Federalist Party. The result was that although both parties tried to profit from the case, it did not become a *cause célèbre*.

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[36] *Senate Journal,* 5th Cong., 2d sess., Feb. 19, 1798, pp. 124–125; Constitution, art. III, sec. 2.

[37] *Annals,* 5th Cong., 3d sess., Jan. 11, 1799, p. 2319.

[38] See also *Gazette of the United States,* Jan. 28, 1799.

CHAPTER V

"THE AMERICAN HOUSE OF LORDS"

It will be recalled that during the debate on the Constitution in 1787 and 1788, the future United States Senate was described by its friends as a bulwark of stability—of the "haves" against hasty and radical action demanded by the "have nots"—and denounced by its enemies as a dangerous focus of power inimical to republican principles and to the liberties of the people. The type of men chosen for the first Senate encouraged conservatives to believe that the upper Chamber would effectively perform its conservative role. On the other hand, anti-Federalists professed to see in the Senate's early conduct a prompt fulfillment of their fears.

A majority of the Senators who reported for duty during that memorable spring of 1789 had a high concept of the dignity which should be accorded the officers of the new Government, particularly the President of the United States and the members of the body of which they were a part. No one was quite sure just what kind of institution the Senate was to be, but most of them were positive that it should occupy a far loftier plane than the plebeian House of Representatives.

It will be further recalled that the extreme dilatoriness on the part of many of the first Senators in reporting for duty was interpreted by some critics as savoring of addiction to "monarchy" and "majesterial" dignity—to the idea that government was clothed in such independent dignity that its officers could come and go as they pleased. This may or may not have been the main reason for the tardiness of the Senate in achieving a quorum. However, almost immediately after that quorum was finally achieved on April 6, the Senate found opportunity to contribute to the "splendor" of the new National Government and the supposed superiority of the Senate over the House.

A Royal Title for the President

While the House Members downstairs, led by James Madison, set to work on the finances of the Nation, the Senators in their ornate upper Chamber set to work on business which was apparently considered of equal importance—a title for the President of the United States.

Concern for titles and forms was natural enough considering the personnel of the Senate. Although almost all of the Senators had been sincerely devoted to the Revolutionary cause, they still remembered with fondness the style of government to which they had so long given allegiance, an attitude reinforced by the flouting of authority and the popular disturbances which had contributed to the adoption of the new Constitution. Vice President Adams spoke with affection of "that Government under which we had lived so long and happily formerly."[1] He and many of the Senators believed that titles and other ceremonial distinctions are an integral part of any self-respecting government; without them a nation would be without obedience at home or honor abroad.

As he first surveyed the Senate from his elevated, crimson-canopied chair, the Vice President seemed to have the House of Lords before him, and considered the usage of that body the best possible precedent. He wanted the Senate's Sergeant at Arms to be called the "Usher of the Black Rod." Senators must be styled "right honorable" in the minutes—mere "honorable" was not enough, being a "colonial" appelation applied to the "justice of every court." He was anxiously concerned over the great constitutional question of whether he himself should be styled "Vice President" or "President of the Senate" or both, insisting on the former as implying greater dignity.[2] This concern with titles and ceremonies he shared with his wife, the doughty Abigail, who was much chagrined whenever her "inferiors" tried to usurp her place at Mrs. Washington's side at the latter's levees.[3]

The whole subject of forms and etiquette came to a head over the question of a title for the President. Led by the Vice President, who was vehemently seconded by the aristocratic Richard Henry Lee of Virginia, the Senate majority endeavored to attach to the office of the President a distinguished title, designed to attract to the American Presidency the respect, at home and abroad, that the office merited. Adams and many of the Senators were fully convinced that "President of the United States" was so humble an appelation that it would be an object of scorn. There were "presidents" of fire companies and cricket clubs. Snorted Adams:

> What will the common people of foreign countries, what will the sailors and the soldiers say, "George Washington, President of the United States"? They will despise him *to all eternity*.[4]

There was some difficulty in hitting upon just the right title—one that would be distinctive but at the same time appropriate. "His Elected Majesty" or "His Elective Highness" were good, but the "Elective" sounded too much like "Electoral," which would have a distressing sound to thousands of citizens who had fled from oppression in Germany. The title finally decided upon was "His Highness, the President of the United States of America, and Protector of their Liberties."[5]

It was, of course, hoped that the House would join in the effort, but this hope was dashed when a joint Senate-House committee rejected any title for the President and the lower House immediately accepted the committee's report, acting thereon in addressing a message to the President without any title but "President." The Senate disapproved the report, but was now left as the sole mover behind the project. House hotheads like Parker and Page of Virginia soon had the lower Chamber in an uproar, with a resolution afoot to censure the Senate for its lofty attitude. Fisher Ames suspected that their aim was to needle the Senate into bestowing a title on the President independently and thereby bringing the upper Chamber into disrepute.[6] The Senate's claim to superiority in the proposed rules for communicating between the two Houses rankled in their minds.[7] However, the counsel of Madison and other calmer heads prevailed. A conference between the two Houses was arranged—not that the House had any intention of backing down, but merely, in Madison's words, "to cement that harmony which has hitherto been preserved between the Senate and this House * * *." The clear-headed Madison believed that "it deserves some pains to bring about that good will and urbanity, which, for the despatch of public business ought to be kept up between the two Houses." [8]

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[1] Maclay, *op. cit.*, p. 10.

[2] *Ibid.*, pp. 31–32, 39–40, 45, 64–65.

[3] Letter, Abigail Adams to her sister, Jan. 5, 1790, Stewart Mitchell (ed.), *New Letters of Abigail Adams, 1788–1801* (Boston: Houghton Mifflin Co., 1947), p. 35. Mrs. Adams privately referred to the President as "His Majesty."

[4] Maclay, *op. cit.*, p. 27.

[5] *Annals*, 1st Cong., 1st sess., May 14, 1789, p. 36.

The conference took place and its members failed to agree. The Senate subsequently passed a resolution maintaining the rightness of its stand but acquiescing in the action of the lower House to preserve harmony with that body. Thus the affair ended with a reasonable degree of good will between the two Houses.[9]

Bestowing such a title on the President was not quite the revolutionary proposal that it appears to be today. Government at that time was generally conducted by the upper classes, which, in spite of the Revolution, still put much emphasis on rank and ceremony. Newspapers referred to Washington as the "Illustrious President," to Adams as "His Excellency," and to Senators as "Most Honorable." Washington himself, careful to steer a middle road, held levees which had a certain royal air.

The concern for a title for the President no doubt stemmed partly from a desire for the strong Executive leadership which was absent under the Articles of Confederation and which might be advanced by attaching to the Executive's office a symbol that would attract respect.[10] This same line of reasoning was doubtless behind the Senate's attempt in the Second Congress to place on U.S. coins a figure of the head of the current President with his name and order in the presidential succession, an "aping of monarchy" which was again thwarted by the lower House.[11]

However, the effect of the Senate's effort to bestow a title on the President was quite unfortunate.

In the first place, there was the obvious danger of giving the new government a monarchic cast, entirely out of harmony with the desires of most of the people. Three years later Adams claimed that his only interest in a title for the President rose from the fact that he was faced with the question of how to address the President when he was received by him, and that though he considered "decent and moderate titles, as distinctions of offices" not only "harmless, but useful in society," no citizen was more indifferent on the subject than he was.[12] Yet the term

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[6] Letter Ames to George Richards Minot, May 14, 1789, Ames, *op. cit.*, I, 36.

[7] See *infra*, pp. 61–62.

[8] *Annals*, 1st Cong., 1st sess., May 11, 1789, pp. 331–337.

[9] *Ibid.*, May 14, 1789, p. 36.

[10] Wilfred E. Binkley, "The President as a National Symbol," *Meaning of the 1952 Presidential Election, Annals of the American Academy of Political and Social Science*, V, No. 283 (September 1952), 87–88.

[11] *Annals*, 2d Cong., 1st sess., Mar. 24 to 26, 1792, pp. 483–490.

[12] Letter Adams to "A Recluse Man," Jan. 19, 1792, Adams, *op. cit.*, VIII, 512–513. Actually, in 1789 Adams had included "titles and pageantry" as definite parts of his theory of government. In that year he wrote Benjamin Rush:

"I do not abhor Titles, nor the Pageantry of Government. If I did I should abhor Government itself, for there never was, and never will be, because there never can be any government without Titles and Pageantry. There is not a Quaker Family in Pennsylvania, governed without Titles and Pageantry; not a school, not a college, not a club can be governed without them." Letter Adams to Rush, June 9, 1789, in Benjamin Rush, *Old Family Letters: copied from the originals for Alexander Biddle* (Philadelphia, 1892), p. 38, cited by Manning J. Dauer, *The Adams Federalists* (Baltimore: Johns Hopkins Press, 1953), p. 48 fn.

"Highness" was certainly one that was intimately connected with royalty and could scarcely be considered by the public in any other light than an intention to give the presidency a somewhat royal air. Washington himself was irritated by the proposal, fearing that it be supposed that he desired a title, and mildly reproached those who had stirred up so much animadversion.[13]

Secondly, the effort took a substantial part of the Senate's time for 3 solid weeks, April 23 to May 14, during those all-important first months of the new government, giving the informed public the impression that the Senate was frivolous, to say the least—especially in view of its month-long delay in achieving a quorum. This contrasted unfavorably with the lower House, which set right to work on the vital problem of the new government's finances.

In the third place, it exacerbated relations between the two Houses and—what really pained a chamber with pretensions of superiority—made the Senate vulnerable to ridicule. "Yesterday Mr. Muhlenberg accosted me with *Your Highness of the Senate*," wrote the peevish Maclay. "On my pausing, he said Mr. Wynkoop had been christened by them [members of the Pennsylvania delegation in the House] 'His Highness of the Lower House,' and he thought I was entitled to the same distinction in the Senate." Adams, particularly, became the subject of much sport, acquiring the title of "His Rotundity" and being lampooned to his very face when he visited the House debates.[14] Perhaps this method of fighting with ridicule the Senate's patrician ideas was the most effective method possible of bringing that body around to principles more in keeping with the temper of the Nation. Regardless of how much certain Members might profess disdain for public opinion, the Senate no doubt took stock of the fact that popular sentiment on such questions as titles was definitely against the stand it had taken. Even friendly House Members and sympathetic newspapers expressed the desire that the Senate should not take such matters so seriously.[15]

Perhaps the most important effect of this title controversy, as far as the Senate was concerned, was the ammunition given to the Chamber's critics, who professed to believe—and lost few opportunities to proclaim—that the Senate all along was antagonistic to republican principles and was merely waiting for the proper occasion to usher in a government of "king, lords, and commons." Though often latent, such criticisms became prominent whenever the Senate took a stand that was especially obnoxious to the Republicans. This was particularly true half a dozen years later when the Senate took its extremely unpopular stand with respect to the Jay Treaty. Then Boston's Republican *Independent Chronicle*, echoed by Bache's *Aurora*, inflated the proposed "regal" title to "His Majesty, George, by the grace of God, President of the United States," and claimed this was merely a proposed first step in giving royal powers to the President.[16]

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[13] Letter, Washington to David Stuart, July 26, 1789, Fitzpatrick, *op. cit.*, XXX, 362–363.

[14] Maclay, *op. cit.*, pp. 30, 33–34, 205.

[15] Letter, Fisher Ames to George Richards Minor, May 26, 1789, Ames, *op. cit.*, I, 46; *Pennsylvania Gazette*, May 13, 1789.

The bantering Maclay received from his House friends probably gave him the idea of using ridicule in an attempt to defeat the title in the Senate, which he did with little success. His *Journal*, pp. 1–45 *passim*, and pp. 65 and 140, describes these events at length, revealing that the Pennsylvanian took the lead in the Senate in the effort to defeat not only a title for the President but every other suggestion of aristocratic deportment. However, the diary so viciously attacked Adams and all others who disagreed with him that it cast grave doubts on the balance of Maclay's judgment. On the other hand, he wrote with such minute detail about scenes and events of which he was himself a part, that his account can hardly be ignored.

[16] *Aurora*, Dec. 24, 1795, quoting an article signed "The Ghost of Warren" in the *Independent Chronicle*.

The House Refuses To Bow

In the meantime, the Senate's devotion to pomp and ceremony led it into another defeat at the hands of the House. An effort to put the superior rank of the Senate into the rules governing communications between the two Houses collapsed when the lower Chamber simply refused to accept such a distinction.

A joint committee was named to frame these rules, Caleb Strong, Ralph Izard, and Richard Henry Lee representing the Senate. These Senators were apparently able to convince their House counterparts that the Senate was, indeed, the more exalted body. The resultant joint committee report was consequently so framed as to illustrate not only the Senate's claim to superiority but also its current penchant for form and ceremony. It deserves to be quoted in full:

> When a bill or other message shall be sent from the Senate to the House of Representatives, it shall be carried by the Secretary, who shall make an obeisance to the chair, on entering the door of the House of Representatives, and another on delivering it at the table into the hands of the Speaker. After he shall have delivered it, he shall make an obeisance to the Speaker, and repeat it as he retires from the House.
>
> When a bill shall be sent up by the House of Representatives to the Senate, it shall be carried by two members, who, at the bar of the Senate, shall make their obeisance to the President, and thence, advancing to the Chair, make a second obeisance, and deliver it into the hands of the President. After having delivered the bill, they shall make their obeisance to the President, and repeat it as they retire from the bar. The Senate shall rise on the entrance of the members within the bar, and continue standing until they retire.
>
> All other messages from the House of Representatives, shall be carried by one member, who shall make his obeisance as above mentioned; but the President of the Senate, alone shall rise.[17]

It will be noted that in addition to designating carefully the proper number of obeisances, the report specified that messages from the Senate to the House were to be carried merely by the former's *Secretary*, while—as a mark of deference—messages from the House to the Senate were to be sent *up* by one or two House *Members*.

The Senate accepted this report as merely giving the upper Chamber its due, but the House greeted it with a mixture of amusement and resentment. The House recommitted the report and secured from the joint committee a new one, omitting the elaborate specifications about obeisances and providing merely that messages be "respectfully communicated to the Chair" by "such persons as a sense of propriety in each House may determine to be proper."[18] But this new report with its implication of equality between the Chambers was unsatisfactory to the heady Senators, who flatly rejected it. Long discussions followed to determine what should be done under the circumstances. Some Senators objected to the House Clerk being permitted to come within the bar of the Senate. Lee insisted that the proper method was that of Parliament—"for the Sergeant at Arms, with the mace on his shoulder, to meet the Clerk at the door and receive his communication." However, the Senate was not equipped for such ceremonies, "having neither mace nor sergeant nor masters in chancery," to use Maclay's expression.[19]

A number of Senators, including the highly influential Ellsworth, favored exchanging communications between the two Houses through

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[17] *Annals*, 1st Cong., 1st sess., Apr. 23, 1789, p. 23.
[18] *Ibid.*, Apr. 28, 1789, pp. 221–222.
[19] Maclay, *op. cit.*, p. 8.

Members sent by each, rather than through the Secretary and Clerk. This would be the most practical—as well as friendly and cordial—method, since it would prevent interruption of business, the Senate not being able to proceed without the Secretary being present to record the proceedings.

Finally it was decided, rather ungraciously, that until "a permanent mode of communication" was adopted, the Senate would agree to receive messages through the House Clerk, "if the House shall think proper to send him," in which case his message would be received at the door by the Senate Secretary, who would deliver it to the Presiding Officer. If the House should reverse its stand and send its messages by one or more Members, they would be received with all the ceremonies previously suggested. The same day the House sent a message to the Senate—by its Clerk. Since the lower Chamber never changed its mind about the relative dignity of the two Houses and the Senate was helpless to enforce any other procedure, the "temporary mode" perforce had to be accepted as permanent.[20]

A second means used by the Senate to accentuate its alleged superiority over the House was the wording of the enacting clause of congressional bills and resolutions. The first bill considered by the Senate—a House bill to regulate the administration of oaths—originally began, "Be it enacted by the Congress of the United States * * *." When it was considered on the Senate floor, an amendment was adopted to make the clause read, "Be it enacted by the Senate and Representatives of the United States of America in Congress assembled * * *." It was openly acknowledged that the purpose of this amendment was to emphasize the preeminence and dignity of the Senate. The House apparently declined to make an issue of anything so innocuous and let the change stand.[21]

THE PAY DETERMINES THE DIGNITY

A third attempt by the Senate to enhance its own prestige at the expense of the House involved a proposed discrimination in pay in favor of the upper Chamber. It had been proposed at the Philadelphia convention to make such a discrimination explicit in the Constitution. On the other hand, Charles Pinckney had proposed that Senators receive no salaries at all, to limit the upper Chamber to wealthy men. The upshot was that the Constitution merely provided that Members of both Houses were to receive compensation for their services, to be paid out of the Federal Treasury.[22]

The House, which took first action on the salary bill, provided for a compensation of $6 per day for Members of both Houses while Congress was in session, plus $6 for each 25 miles of travel to and from sessions.[23] The Senate objected to such implied equality and adopted a resolution declaring there ought to be a discrimination between the pay of Senate and House Members. Accordingly, the upper Chamber amended the bill to provide for $6 per day and $6 for each 20 miles of travel for both Senate and House Members until March 4, 1795, but after that day, $8 per day plus $8 travel pay for Senators, while the Representatives' compensation would remain the same. An extra $2 per day would be of little moment to most Senators, the great majority of them being independently wealthy; besides, it could not be claimed that they were seeking more pay for themselves, since the increase would not go into effect until all their terms had expired. The aim, then, was clearly that of recognizing the Senate's supposedly superior rank.[24]

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[20] *Annals, op. cit.*, May 2, 1789, pp. 30 ff.

[21] *Ibid.*, May 6, 1789, p. 282; *Senate Journal*, 1st Cong., 1st sess., May 4, 1789, pp. 27–28; Maclay, *op. cit.*, pp. 16–17.

[22] Prescott, *op. cit.*, p. 415; Constitution, art. I, sec. 6.

[23] This compensation was considered "exorbitant" by democrats throughout the country, who claimed that such high salaries presaged an aristocratic Government.

The salary bill gave supporters of a "high-toned" Senate an opportunity to discourse on the superior rank of their Chamber. Some even professed to scorn such bourgeois matters as wages and public opinion. Some of Maclay's remarks in this regard are interesting enough to quote in full (although he possibly exaggerated):

> Up now rose Izard; said that the members of the Senate went to boarding-houses, lodged in holes and corners, associated with improper company, and conversed improperly, so as to lower their dignity and character; that the delegates from South Carolina used to have £600 per year, and could live like gentlemen, etc. Butler rose; said a great deal of stuff of the same kind; that a member of the Senate should not only have a handsome income, but should spend it all. He was happy enough to look down on these things; he could despise them, but it was scandalous for a member of Congress to take any of his wages home; he should rather give it to the poor, etc. Mr. Morris likewise paid himself some compliments on his manner and conduct in life, his disregard of money, and the little respect he paid to the common opinions of people.[25]

A double problem was involved here: first, discrimination between the pay of Senate and House Members, and second, the salary level of Government officials generally. Those who believed in the superior rank of the Senate generally supported not only a salary discrimination in its favor but also a higher level of pay for all Federal officials. Although their support of the former was probably unfortunate, they were on solid ground from the standpoint of public policy when they insisted that Federal officers receive pay that would attract men of ability, as later experience has amply shown.

A minority of the Senators—from his own description apparently led by Maclay—not only opposed a pay discrimination in favor of the Senate as unwarranted by the Constitution, but denounced high Federal salaries generally, as tokens of a dangerously aristocratic spirit and a fatal drain on the Treasury. In a Senate speech, Maclay expressed his own philosophy:

> I did not speak long, and, enraged as I was at such doctrines, I am sure I did not speak well. I endeavored to show what the true dignity of character of individuals consisted in; as well as of the assembled Senate. And then, turning, showed that extravagant expense, haughty and distant carriage, with contemptuous behavior to the mass of mankind, had a direct contrary effect; that, in short, mankind were not esteemed in the ratio of their wealth, and that it was in vain for the Senate to attempt acquiring dignity or consequence in that way; that I was totally against all discrimination; that we were all equally servants of the public; that if there really was any difference in dignity, as some contended, it could not be increased by any act or assumption of ours—it must be derived from the Constitution, which afford, in my opinion, no authority for such distinction.[26]

Maclay accordingly moved that the Senate and House Members alike receive $5 per day for their services. His record, which bears some marks of overstatement, states that the proposal was greeted with a storm of abuse from his fellow Senators, apparently caused by the necessity of having to go on public record on such an issue in a yea-and-nay vote. At any rate, the amendment received the votes of only Maclay, Jonathan Elmer, Paine Wingate, and Philip Schuyler. Wingate, the New Hampshire Yankee, voted with Maclay because he was a stout exponent of the most severe economy in government, fearing that extravagance would "curse the Government in the outset." Why Schuyler (Hamilton's immensely wealthy father-in-law) and Elmer voted as they did does not appear on the record. Perhaps the former believed that Senators should go without any pay at all, in the aristocratic tradition.[27]

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[24] *Senate Journal*, *op. cit.*, Aug. 28, 1789, pp. 108–111.
[25] Maclay, *op. cit.*, p. 135.
[26] *Ibid.*, pp. 139–140.

In the House of Representatives, the proposal to grant higher pay to the Senators excited a tempestuous debate. It was naturally denounced by Members sensitive of the dignity of their House.

Georgia's spirited James Jackson, later a Senator himself, declared that the House could not be too cautious about acquiescing in any such Senate pretensions. "All governments," said he, "incline to despotism, as naturally as rivers run into the sea." Duties and expenses being equal, the pay ought to be the same. Unless the Representatives meant to depress themselves and thereby set the Senate above them, he could not conceive any foundation for discrimination. Andrew Moore of Virginia claimed that the business of the two Houses was equal, or if there were any difference in legislative concerns, it was in favor of the House. He had no idea of giving public money to support "fanciful dignity and superiority."[28]

John Vining, later a Federalist Senator from Delaware, believed that "men of rank and opulence" would have enough influence to "draw the regard of the small and select circle of a State legislature" and thus achieve election as Senator, while "the Representatives in this House, being the choice of their fellow citizens, among whom rank and dignity is rather unpopular, will consist of men in middling circumstances." Such considerations would favor a discrimination in favor of House Members, who would need the money more. Others claimed that higher pay would cause Senators unduly to prolong congressional sessions.[29]

Unexpected support of the Senate came from Virginia Representatives who were afterward in the Jefferson camp. Richard Bland Lee, member of the joint committee which had prepared the report assigning the Senate superior dignity in communications between the two Houses, accepted the idea that the Senate actually was the superior body, and thus its Members merited higher pay. The Constitution had already given the Senate a higher rank by requiring of Senators greater age, longer citizenship, and indirect ("purified") election. It was important that every motive of honor and interest be called forth to bring out the best men, particularly since the Senate was the barrier shielding the people from both an "aspiring Magistracy" and the anarchy often generated by "time-servingness to veering popularity" which might characterize the lower House. The country would gain these objects at a triffling price if they could be obtained by a distinction of $2 or $3 per day. It might be true that there were at present as many young men in the Senate as in the House, but the time would come when none but the most venerable, virtuous, and capable would have public confidence enough to achieve Senate seats.[30]

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[27] ***Ibid.*, pp. 140–142; letter Wingate to John Langdon, Aug. 28, 1789, Wingate, *op. cit.*, II, 329.**

[28] ***Annals, op. cit.*, July 16, 1789, pp. 677–678, 680.**

[29] ***Ibid.*, pp. 680–683.**

John Page declared that he did not believe more money would confer more importance, but insisted that something of this kind would be required to stimulate gentlemen to undertake 6 long years of Senate service. For his own part, he might consent to come to Congress for 2 years, but hardly any inducement could bring him to stay for 6. (He was subsequently reelected three times.) If Members were afraid of aristocracy, they should be careful not to make the pay so low as to exclude men of "middling fortunes" in favor of men of "rank and distinguished opulence." Madison took much the same stand. He declared that the Constitution evidently contemplated a distinction in favor of the Senate in order that men of abilities and firm principle, who might otherwise prefer retirement to the fatigues of public life, might be induced to devote their knowledge and experience to their country's service. Unless something like this were done, it might be difficult to get proper men to accept Senate seats, since "men of enterprise and genius will naturally prefer a seat in this House, considering it to be a more conspicuous situation." Six dollars a day was more than he had contemplated for the lower Chamber, since it was apt to excite untimely public criticism, but when it became apparent that there would be no immediate differential between the two Houses, he accepted the $6 figure out of respect to the Senate and to all the Members from South Carolina, Georgia, and other distant States. Apparently he believed that the travel allowance would not cover the cost of the latter's long journeys to and from the Capital.[31]

The immediate reason for this debate was a motion by Theodore Sedgwick of Massachusetts (later a Federalist leader in the Senate and subsequently Speaker of the House) to retain the $6 figure for Senators but reduce House pay to $5 per day. He claimed that it would be almost impossible for a Senator to return to his former occupation with any prospect of success after a 6-year term, which, taken out of the life of a man past middle age, could thus be deemed a whole life. On the other hand, self-denial on the part of House Members in accepting a $1 reduction would be of good influence on the administration of the Government. This was carrying water on both shoulders—accepting the Senate's claim to more exalted rank, while at the same time pleasing the Treasury watchdogs and those who feared an aristocracy of "high-paid" Government officials.[32]

Despite such arguments, the Sedgwick motion was defeated by a considerable majority and $6 per day for both Houses approved.[33]

When the salary bill came back from the Senate with the $2 differential after 1795 inserted, the House renewed the debate. However, the session was now nearing its close, and House Members—many of them less prosperous than their colleagues in the upper House—feared that refusal to accept a discrimination in favor of the Senate would defeat the bill altogether and they would have to go home without any pay at all. Aedanus Burke was sorry that the House had not tabled the bill providing compensation for the President and Vice President and used it as a hostage for Senate passage of the congressional pay bill without discrimination. James Jackson replied that he would rather go without pay than accept the principle of House inferiority and hoped some expedient might be devised to enable Members to get enough money to pay expenses and thus enable them to let the bill die.[34]

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[30] *Ibid.*, pp. 677–678.

[31] *Ibid.*, pp. 679, 683–684; letter Madison to James Monroe, Aug. 9, 1789, Hunt, *op. cit.*, V, 415.

[32] *Annals, op. cit.*, July 16, 1789, p. 677; Aug. 5, 1789, pp. 703–712.

[33] *Annals, op. cit.*, July 16, 1789, p. 684; Aug. 10, 1789, p. 715.

By a vote of 29 to 25, the House finally—reluctantly and under pressing necessity—accepted a salary discrimination in favor of the Senate. But the Senate gained only the barest possible minimum acceptance of its claim to higher rank through higher pay. The House reduced the differential from $2 to $1, to go into effect after March 4, 1795—and then limited the duration of the whole bill to March 4, 1796, thus throwing the question open to further debate after the differential had been in effect but a single year.[35]

In retrospect, it seems doubtful if the small sums of money involved could have accomplished all the good or ill claimed by the protagonists of both sides. However, the principle involved went beyond the $1 or $2 per day under discussion. It must be conceded that there was considerable merit to the claim that the Constitution implied the propriety of giving the Senators higher pay. It could not be denied that the requirements for election to the Senate were higher. The words of Madison concerning the intention of the framers of the Constitution must be given great weight, inasmuch as he probably knew as much about the motives of the framers as any man. Even Washington, who was also present at the Constitutional Convention, believed that the Senators deserved higher pay, confidentially writing to Madison about the advisability of vetoing a salary bill that did not provide for it.[36]

However, in spite of a certain constitutional justification for the Senate's claim to superiority and consequent higher pay, the upper Chamber gained this forced, reluctant, and minimum House acceptance of the principle only at the cost of a further loss of the prestige it was trying so hard to gain. Many of the House Members were embittered by the Senate's taking advantage of their personal financial necessities to grind this concession from them, while outside Congress, critics had one more example to cite of the Senate's frivolous pursuit of empty honors.[37]

On the other hand, it was fortunate that the Senate's claim to preeminence took the form of a demand for higher pay rather than forgoing any pay at all, in the tradition of Parliament and the colonial councils. Such an act of *noblesse oblige*, which would have been perfectly consonant with the attitude and pocketbooks of many of the Senators, would have hemmed the senatorial toga with purple as nothing else could, and would have been a move that the House could not very well have resisted. Such a stand was discouraged by the constitutional provision that Members of Congress were to receive a compensation for their services, but conceivably that hurdle could have been overcome by a "dollar-a-year" arrangement.

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[34] *Annals*, *op. cit.*, Sept. 11, 1789, p. 924.

[35] *Ibid.*, pp. 925–926.

[36] Letter, Washington to Madison (no day), 1789, Fitzpatrick, *op. cit.*, XXX, 394.

[37] For an example, see letter James Jones to Madison, July 3, 1789, *Massachusetts Historical Society Proceedings*, XV, 2d series (June 1901), 132.

In 1791 the Senators expressed their attitude toward the relative dignity of their estate by adopting a resolution to the effect that Senators could with propriety pay the first visit to all ambassadors, after they had been received by the President, but would expect to receive the first visit from all other foreign diplomats.[38]

Since the $1 differential between Senate and House pay did not go into effect for 6 years, agitation on that subject subsided after the adjournment of the first session of the First Congress, except as it was part of the more general clamor against any display of pomp or symbol of rank. Indeed, after the first year or two the Senators, apparently realizing the odium attached to their Chamber by their claims of prerogative, said much less about outward forms, titles, and ceremonies, and addressed themselves to more practical problems. This tendency was hastened by the advent of the antimonarchic and antiaristocratic stages of the French Revolution, the contagion of which spread to America to such an extent that even the harmless title of "Mr." was spurned in some circles in favor of "Citizen," and even the inelegant title of "Citess" appeared. This "French disease" was, of course, resisted by the conservatives but undoubtedly did help make them more circumspect in matters of aristocratic form.

When the new congressional salary bill came up in the House in February 1796, there was only a feeble effort by John Page to retain the $7-per-day salary for the Senators, after which the House passed a bill providing $6 per day for Members of both Houses.[39] Such action could be expected from the lower Chamber. The extent of the Senate's retreat from pursuit of an outward show of superiority is better revealed by the fact that in that year the upper Chamber made no effort to retain the $1 differential. Neither *Annals* nor *Senate Journal* give more detail than the bare fact of Senate acquiescence in the bill as passed by the House. However, one of the Senators in a letter stated categorically the reason which prompted the Senate to give up the bauble for which it had contended so vigorously 6½ years before. Prompt acquiescence in the House bill was agreed upon by the Federalist majority in a caucus at Senator Bingham's—to help coax the House into agreement on legislation to put the Algerine treaty into effect, showing quite a significant change from emphasis on rank and form to a concern for more practical measures.[40]

A Lofty Secrecy

Besides its effort to obtain a royal title for the President and its claims to deference from the House, the Senate allegedly exhibited an aristocratic temperament in closing its doors to all outsiders during the conduct of its business.

No other Senate action was subjected to such a sustained barrage of criticism during the Senate's first 5 years. The Senate was decisively defeated on the question of a Presidential title. The effort to obtain deference from the House in the method of communication between the two Chambers was not revived. The salary discrimination would not go into effect until 1795. But the sight of the Senate's closed doors, day in and day out, with resultant suspicions of dark anti-Republican plots hatched behind them, goaded the Senate's critics to sustained resentment. They charged that the secrecy of the Senate's sessions evidenced attachment to the prerogatives of monarchic rule—to the idea that government was the concern solely of rulers, who would do what they though best for the country without taking the people into their confidence. This secrecy contrasted sharply with the deliberations of the lower House, which were not only open to the public but reports of which were widely circulated through the newspapers.

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[38] Entry by Tobias Lear, President Washington's secretary, in Washington's "Letter Book," Oct. 26, 1791, Fitzpatrick, *op. cit.*, XXXI, 405.

[39] *Annals*, 4th Cong., 1st sess., Feb. 26, 1796, p. 378.

[40] "Letter from a New Jersey Senator," *Magazine of American History*, X (December 1883), pp. 509–510. (The writer of this letter is not identified, but must have been either John Rutherfurd or Frederick Frelinghuysen.

> This *Patrician* stile, this concealment, this affection of pre-eminence but illy accords with the spirit of republican government. The Constitution of the United States acknowledges no superiority of one legislative body over the other, and to *assume* it is a violation of its principle, and an insult to the character of freemen. It is a strange maxim in republican policy, that the agents of the people should keep their deliberations concealed from those from whom they derive their political existence. It augers an unfriendly disposition in a public body that wishes to *masque* its transactions—Upright intentions, and upright conduct are not afraid or ashamed of publicity. The spirit of a *Venetian senate* suits not, as yet, the meridian of the United States; neither does the conduct of a *conclave* or a *divan* comport with the feelings of Americans.
>
> The citizens of the United States would, no doubt, spurn at the idea of an avowed introduction of aristocracy or democracy among them. The people of Rome in the time of Caesar and Augustus were not less averse from the title of king, but the sound of emperor misled them.[41]

The story of the Senate's "closed-door policy" and its eventual abandonment will be told in chapter XIV below. However, it should be pointed out here that although this policy was bitterly attacked for its aristocratic connotations, it was apparently not originally adopted in a deliberately anti-republican spirit. The Senate was merely following in the footsteps of its predecessor, the Congress of the Confederation, and apparently even the most outspoken critics of patrician pretensions voiced little or no objection at the time. Maclay, with his bitter scorn of even the shadow of aristocracy, later vehemently supported open doors, but in 1789, as a member of the committee named to write the Senate's Standing Rules, he prepared a set of proposed rules which not only said nothing about opening the Chamber doors to the public but provided that "inviolable secrecy shall be observed with respect to all matters transacted in the Senate while the doors are shut, or as often as the same is enjoined from the Chair." The impetus for opening the doors first came the following year through instructions to the Virginia Senators by the legislature of their State.[42]

The continued emphasis in the preceding pages on the differences between the Senate and the House has no doubt given the impression that the Senate's claims to deference resulted in such continued bitterness that the two Houses became arrayed one against the other in a spirit of mutual rancor. That is stating the situation much too strongly. Relations between the two Houses were usually friendly. Joint committees, exchange of information, Senators' visits to House sessions, and social contacts promoted good will between Members of the two Houses. Neither is it true that the Senate spent all, or a major part, of its time on these matters of precedence and form. The first session of the Senate left behind it a record of solid achievement, particularly with respect to establishment of the Federal judiciary.

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[41] "Condorcet" in the *National Gazette*, Dec. 15, 1792. The italics are in the original. Note that the writer had an aversion to both "aristocracy" and "democracy," reserving his support for *republican* government.

[42] Maclay, *op. cit.*, pp. xiv, 251.

Yet it cannot be denied that the Senate's concern with forms and ceremony and its quest for recognition of its claim to higher rank constituted a false start during those important precedent-making days of 1789. The Senate's critics claimed that the move to give a title to the President and other actions of similar import foreshadowed a plan to usher in a monarchy. Although this was doubtless false, the Federalist period might have been characterized by an even more "high-toned" government than the one that that party did establish if such comparatively minor moves had not been checked at the start. Moreover, it can be said with certainty that the Senate would have saved itself much opposition and often unmerited distrust if it had taken greater pains in the very beginning to implant itself solidly in the public's confidence rather than pursuing elusive marks of superiority.

KING, LORDS, AND COMMONS

When Hamilton presented his fiscal program designed to tie the wealthy classes of the Nation to the new Federal Government with cords of self-interest, he found his most enthusiastic support in the upper Chamber. In particular, it was behind the closed doors of the Senate Chamber that the Hamiltonians wrote the legislation establishing the Bank of the United States, darling of the financial elements.

As time went on, the Senate, with its larger and more dependable Federalist majority, became, in far greater measure than the lower House, identified not only with Hamiltonian finance but with other extensions of Federal power, with Great Britain against Revolutionary France, with manufacturing and commerce rather than agriculture, with the opulent city merchants, and with the executive officers of the Federal Government. This gave a certain credibility to the charge that the Senate was endeavoring to create a moneyed aristocracy of which the upper Chamber would be the special representative. It was then only a short step to the charge that the Federalist Party sought to make the upper Chamber a hereditary House of Lords after the British model.

Such accusations were constant during the entire period of Federalist rule and contributed significantly to the political climate in which the Senate worked during that period. It is impossible to understand the Senate's place in the political scene during the 1790's unless one bears continually in mind that Republicans charged—and apparently believed—that there existed in the United States a strong undercurrent of Federalist support for a government of "king, lords, and commons"—a metamorphosis of the President into a king and of the Senate into a House of Lords, the House of Representatives alone to represent the popular will.[43]

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[43] A good example of this linking of the Senate with the elements which formed the bulwark of the Federalist Party is contained in a rather impartial description of the American party structure in 1794 written by Thomas Cooper and quoted in the *Aurora*, Aug. 3, 1795.

The cries of "aristocracy" often leveled at the Federalists usually carried the implication that they aimed to make the Senate a hereditary body like the House of Lords. However, they sometimes involved the accusation that the Senate was merely the hotbed of sentiment for a wider order of nobility in America. At other times the charge was that the indirectly elected and lofty Senate already had so much power that it paralleled the House of Lords in comportment and influence.

A number of factors lent at least surface credibility to such accusations. Since the Constitution had been framed behind closed doors, the general public did not, of course, know the full story about proposals which had been made and dropped during that critical summer in Philadelphia. However, Republican leaders knew all about them—since some of them had been there. They were thus aware that Hamilton and others, including future Senators such as George Read, Robert Morris, and Gouverneur Morris, had proposed that Senators be chosen for life. This, the Republicans professed to believe, continued to be orthodox Federalist doctrine. In 1798, when party feeling was at a feverish height, the blatantly pro-Republican *Aurora* obtained from a member of the Convention, and published, the gist of Hamilton's plan for a President and Senate chosen for life, the obvious purpose being to identify such doctrine with the whole Federalist program.[44]

From the very beginning of the new Government in 1789, suspicious commoners looked askance at what they considered evidences of monarchical spirit in the "American court"—the President's equipage and formal levees; titles like "Excellency, Honorable, and Esquire"; celebration of the President's birthday and other marks of servile "adulation" of the President; splendid balls attended by "courtiers" dressed in the height of fashion, and in general a ceremonial distance between Government officials and the people. Such suspicions were not allayed by the Senate's effort to bestow a "regal" title on the President. There were rumors afloat that "mitres" and "maces" had been imported in 1789 and 1790 to serve as court props for the American monarch, while the practice of a certain Federalist newspaper in recording the births of children of leading officials was interpreted as an attempt to teach the people to look upon the offspring of public officials as a set of superior beings.[45]

Although Washington himself did his very best to strike a happy medium between an austere aloofness and a familiarity which would have debased his office, there was much about the gay and opulent social life of the Capital—particularly when it was located at Philadelphia—to which men of true republican simplicity could legitimately object, as the pages of Rufus Wilmot Griswold's *Republican Court* well illustrate. In this *haut monde*, Senators played a prominent part, especially William Bingham and Robert Morris of Pennsylvania, whose palatial residences were the centers of fashionable Capital society. Anne Willing Bingham, wife of a millionaire Senator and daughter of a millionaire banker, was its unchallenged queen. Certainly the sumptuous Bingham mansion, an enlarged copy of the Duke of Manchester's in London, did nothing to dissolve any connection in the public's mind between the Senate and aristocracy. Neither did the Morris household, complete with its retinue of liveried coachmen and footmen.[46]

This social whirl was interpreted by strict republicans as the outward expression of an inward attachment to the very theory of monarchy—and to its natural appurtenance, a noble House of Lords.[47]

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[44] *Aurora,* Jan. 13, 1798.

[45] *National Gazette,* Jan. 2, 1793.

[46] Griswold, *op. cit.,* pp. 297–298, 311, 327.

[47] For a good example of opposition in the Republican press to alleged expressions of an anti-republican spirit, see an article entitled "Forerunners of Monarchy and Aristocracy in the United States," signed "Mirabeau," in the *National Gazette,* Dec. 12, 1792.

When the French revolutionaries guillotined their king, eliminated the aristocracy by guillotine or exile, concentrated all political power in a unicameral legislature, and turned sword and musket on British and other devotees of "kings, lords, and commons," the nascent Republican Party in the United States enthusiastically approved, and in the process began to wonder whether a Senate was, indeed, consistent with republican government. On the other hand, the Federalists, many of whose leaders had long admired the British system as the best the mind of man could conceive, were driven, in their opposition to the radical ideas arriving on each ship from France, to amplify their support of the British and their political system. Their expressed preference for British monarchy over French republicanism was then interpreted (or misinterpreted) by their political opponents as evidence that they desired to introduce in America a similar system. By making Senate membership permanent and hereditary, the existing Senate could easily be made to fit the British pattern. Republican organs such as the *National Gazette* and the *Aurora* in Philadelphia, the *Argus* of New York, and the *Independent Chronicle* of Boston, all enthusiastically pro-French and caustically anti-British, lost few opportunities to implant in the minds of their readers the idea that the Senate was not only a tool of British interests but was the raw material out of which the Federalists hoped to mold a House of Lords.

Many of the Senators, by their own general bearing and sometimes by their words, did nothing to allay the fears aroused by such accusations. Their wealth and standing in blue-blooded society have previously been described. Whether displaying notorious arrogance like Izard or Sedgwick, or entertaining fashionably and extravagantly like Bingham, or being merely dignified and aloof like George Read, the majority of the Senators were not the type of personality that warmed the hearts of the masses.

To clinch the belief in apprehensive minds that the Senate Chamber was the salon of would-be Lords, there leaked from within its walls reports of anti-republican remarks made therein. For instance, in 1795 Jacob Read, Federalist stalwart from South Carolina, was reported as saying that he would consider himself unqualified for the Senate if he could be swayed by popular influence. This story lost nothing from its telling in the *Aurora*, which satirically observed that such remarks were truly "noble" coming from a man who would import a gold necklace and a robe to adorn the speaker of an American legislature.[48]

Thomas Jefferson made something of a hobby of jotting down in his *Anas*, or by letter passing on to his correspondents, scraps of anti-republican conversation attributed to Federalist Senators. On one occasion his friend John Beckley, Clerk of the House, told him that he (Beckley) had heard from Tobias Lear, who in turn had heard from Senator John Langdon, the following alleged remark of Senator George Cabot:

> Ah, things will never go right till you have a President for life and an hereditary Senate.[49]

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[48] "Pittarchus" in *Aurora*, Dec. 23, 1795.

[49] Entry dated Dec. 1, 1793, Lipscomb, *op. cit.*, I, 413. When Lear mentioned the remark to President Washington, the latter is said to have declared that he "had not supposed there was a man in the United States who could have entertained such an idea."

As Vice President, Jefferson was completely out of sympathy with the Federalist majority of the Chamber over which he presided, and continued to record remarks of Federalist Senators purporting to indicate that they expected that their country's republican form of government would have to be replaced sooner or later by a monarchy.

Jefferson professed to be fully convinced that the Federalists actually were brewing an anti-republican plot. As early as 1792 he complained to Washington that the Hamiltonian program would produce a system of "king, lords, and commons." Six years later he claimed that the Alien and Sedition Acts were merely an experiment to see how far the American mind would bear an avowed violation of the Constitution. If these acts were accepted, the country could immediately expect to see an effort made in Congress to keep the President in office for life and then to transfer the succession to his heirs. These bold strokes would be accompanied by a move to establish the Senators in their seats for life.[50]

The man who more than any other was linked in the public mind with the Senate as a potential House of Lords was its President from 1789 to 1797, John Adams. It was not that he was any more devoted to a system of "king, lords, and commons" than many another Federalist, but because he occupied the second highest office in the land—and because he was politically naive enough to put his unpopular thoughts into published writings and into conversations with his political opponents.

In his *Defense of the American Constitutions*, published in 1787–88, and his *Discourses on Davila*, which first appeared serially in the *Gazette of the United States* in 1790, Adams certainly expressed a deep admiration for the British system.

> I only contend that the English constitution is, in theory, both for the adjustment of the balance and the prevention of its vibrations, the most stupendous fabric of human invention; and that the Americans ought to be applauded instead of censured, for imitating it as far as they have done.[51]

Adams believed that a grant of all political power to a single representative assembly would lead to anarchy, and thus stressed emphatically the need for a powerful Executive and a firm Senate to check the popularly elected House and give stability and permanence to the Government. He was quite explicit in declaring that Americans had "with great propriety" so far refused to make their Executive and Senators hereditary. However, he had no great faith in the ability of popular elections to preserve the public welfare over a long period of time. History had proved that "parties, factions, drunkenness, bribes, armies, and delirium" always, sooner or later, obtain the upper hand, and then there would be no other recourse than to extend the terms of the Executive and Senators. If lifetime terms should prove an inadequate remedy, there would be no other recourse but to make the offices hereditary.[52]

This same lack of faith in the firmness of elective institutions was expressed even more strongly in private conversations. One such conversation is reported to have taken place between Adams and Republican Senators John Langdon and John Taylor of Caroline:

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[50] Letter, Jefferson to Stevens Thomson Mason, Oct. 11, 1798, *ibid.*, X, 62.

[51] *Defense of the American Constitutions*, I, in Adams, *op. cit.*, IV, 358. It will be noted that Adams included the qualification "in theory." He objected to inequitable representation of the people in the Commons and also to the influence of the Lords in the lower Chamber.

[52] *Ibid.*, IV, 359; *Defense*, III, in *ibid.*, VI, 56–57, 66–67.

> In the conversation held between Mr. *Adams*, Mr. *Taylor*, and myself, Mr. Adams certainly expressed himself (as far as my memory serves me) in the very words mentioned in your letter viz, That he hoped and expected to see the day when Mr. Taylor and his friend Mr. Giles would be convinced, *that the people of America would not be happy without an hereditary Chief Magistrate and Senate—Or at least during life.*[53]

Jefferson quoted Adams in 1798 as saying that thus far the Senate had done well in bearing up against all popular storms and passions, but that he feared it would not be durable enough and might give way in the end to the pressures of the lower House. Despite Adams' frequent denials, Jefferson remained convinced that Adams favored introduction into the United States of a hereditary President and Senate.[54]

Everything that Adams had ever breathed about the alleged advantages of kings and lords was extracted from his writings and prominently featured by the Republicans in their efforts to defeat him for the Vice Presidency in 1792 and for the Presidency in 1796. Added to his own rather pompous deportment and his concern for titles and ceremonies, they provided effectively inflammable fuel for the anti-Adams fires kindled by the supporters of Jefferson and Clinton. All of which aroused the bitterness of the disconcerted Adams, whose reference to himself as the "heir apparent" revealed that his thinking, at least, had a royal flavor.[55]

A HEREDITARY SENATE: THE LAST RECOURSE

These observations about the Senate as a potential "House of Lords" raise the question whether or not there actually was a move in the 1790's to make the Senate a hereditary body, or at least to extend its term to lifetime appointment. Before attempting to answer this question, a few preliminary remarks are in order.

Such a revolutionary change could have been achieved by one of two methods: by a coup d'etat backed by armed force, or by a campaign to sway public opinion into acceptance of a peaceful constitutional change in that direction.

Not even the most bitter and inveterate of the Federalists' opponents claimed the existence of the former type of plot, nor has anyone turned up any evidence to prove that such an attempt was ever contemplated. The first of these alternatives can, therefore, be written off without further ado.

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[53] Letter, John Langdon to Samuel Ringgold, dated Portsmouth, N.H., Oct. 19, 1800, copied from a "Hagerstown paper" of Nov. 6, 1800, in the *National Intelligencer* of Nov. 19, 1800, italics as in the latter paper. Dauer stated that from Taylor's account, this conversation apparently took place in 1794; see Dauer, *op. cit.*, p. 46 fn.

[54] Letter, Jefferson to Madison, Feb. 22, 1798, Lipscomb, *op. cit.*, IX, 445–446; *Anas* entry Feb. 15, 1798, *ibid.*, I, 421.

Adams wrote Jefferson on July 29, 1791: "If you suppose that I have, or ever had, a design or desire of attempting to introduce a government of King, Lords, and Commons, or in other words, an hereditary executive, or an hereditary senate * * * you are wholly mistaken. There is no such thought expressed or intimated in any public writing or private letter * * *." Adams, *op. cit.*, VIII, 506–509.

Dauer concluded that Adams was completely sincere, but quite mistaken, in these denials. He believed that Zoltan Haraszti's opinion that Adams endorsed monarchy merely to stir up thought is an inadequate explanation. See Dauer, *op. cit.*, pp. 53–54. See also Zoltan Haraszti, *John Adams and the Prophets of Progress* (Cambridge: Harvard University Press, 1952), pp. 40–42.

It should be noted that there is a difference between favoring a system of kings and lords in theory and actually "attempting to introduce" it; Adams certainly never did the latter.

[55] "I am heir apparent, you know, and a succession is soon to take place. But whatever may be the wish or the judgment of the present occupant, the French and the demogogues intend, I presume to set aside the descent." Adams to his wife, Jan. 20, 1796, Adams, *op. cit.*, I, 485.

In fairness to Adams, it must be emphasized that he believed strongly in a government resting squarely on the sovereignty of the people. He feared the influence of aristocracy as well as that of the mass of people. He was first of all a defender of a strong and independent executive as the arbiter between the aristocratic and democratic elements in society. For a good short summary of his political theories, see Dauer, *op. cit.*, ch. iii, pp. 35–54.

After a study of the Federalists' propaganda and publicity efforts, the same can be done with the second alternative.

The Federalist newspaper editors did not conduct such a campaign. On the contrary, they even denied harboring in their hearts any preference for kings and lords. A few examples will emphasize this point: The *Pennsylvania Gazette* opposed granting a title to the President and complimented Congress on its independence of Europe during its very first session. In 1789, toward the close of the first session of the First Congress, Fenno's *Gazette of the United States* exhibited a rather aristocratic conception of the Senate, which it believed should be composed of men motivated to virtue by "the recollection of a long line of ancestors who have sat within the walls of the Senate, and guided the councils, led the armies, commanded the fleets, and fought the battles of the people." It would thus serve as a "living repertory of all the history, knowledge, interests, and wisdom of the commonwealth" and should include men "most conspicuous for fortune, family and wealth." However, far from advocating the hereditary principle, the *Gazette* emphasized that periodical choice by the people would be more advantageous than confining Senate seats to the "eldest son, however defective, to the exclusion of younger sons, however excellent, and to one family, though decayed and depraved, to another more deserving * * *." By 1791, Fenno's paper went further, and quoting an article in the *Columbian Centinel*, Federalist newspaper of Boston, exulted in the thought that "aristocracy is in a deep and rapid decline" and that hereditary executives and legislatures were rapidly becoming "political monsters," while open and magnanimous republicanism was growing more amiable and salutary every day. "Marcellus" in the *Virginia Gazette* declared that an aristocracy, as understood in Europe never existed, or could exist, in America and that any effort to introduce monarchy and privileged orders would be treason.[56]

Federalist press defense of the Adams writings so hotly denounced by the Republicans did not take the form of vindicating his more monarchic pronouncements but of emphasizing Adams' insistence upon different "orders" in government as a check against tyranny or anarchy.[57]

Neither did the Federalist leaders' prolific correspondence reveal plans for a propaganda drive in favor of a system of either king or lords. In fact, reports of even their private comments in favor of an hereditary Senate or lifetime appointments, which Jefferson so assiduously noted in his *Anas*, usually came second- or third-hand from his Republican associates and could easily have been garbled, exaggerated, or taken out of context, as were Adams' expressions regarding monarchy and aristocracy. Jefferson himself indulged in some wild flights of imagination in picturing the plans of the Federalists. He not only charged that the Federalists planned to change the presidency into an hereditary monarchy and Senate terms to lifetime, if not hereditary, appointments, but added accusations so extreme as to inspire total disbelief:

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[56] *Pennsylvania Gazette*, May 13, 1789; *Gazette of the United States*, Sept. 3, 1789, and July 13, 1791; *ibid.*, Nov. 20, 1794.

[57] See "Short Vindication of Mr. Adams' 'Defense of the American Constitution,'" signed "Union," *Gazette of the United States*, Nov. 5, 1796.

William Cobbett's *Porcupine's Gazette* openly lauded everything British. However, its contempt for nearly everything American detracted from its effectiveness in popularizing British institutions among American readers.

> At least this [a hereditary monarchy and a Senate for life] may be the aim of the Oliverians, while Monk and the Cavaliers (who are perhaps the strongest) may be playing their game for the restoration of his most gracious Majesty George the Third. That these things are in contemplation, I have no doubt; nor can I be confident of their failure, after the dupery of which our countrymen have shown themselves susceptible.[58]

Republican critics made the mistake of equating Federalist admiration for the British system of king, lords, and commons with a desire to introduce it in the United States, which did not necessarily follow. What was good for Great Britain might not be good for the United States, and if good, not politically practical. Federalist defense of the British system was generally inspired by Republican espousal of the French Revolutionary device of placing all political power in the hands of a single representative assembly, which—the Federalists were quick to point out—resulted in despotism and the Reign of Terror. Republican apologists for the French Revolution were apt to be quite blind to its darker side and to denouce all criticism of the French Republic as treason to republican principles.[59]

The specter of an American aristocracy usually took the form of the Senate transformed into a House of Lords. However, the Senate was not the only object of such fears. There was the Society of the Cincinnati, the organization of Revolutionary officers, with its hereditary feature, which was denounced as the nucleus of an American order of nobility. There was an alleged threat of a "creeping aristocracy" consisting of exiles from abroad. There were the officers of the Federal Government with their "lordly incomes," who, it was claimed, were separated by a wide gulf from the common people, could sit at the President's table and attend his "royal" levees. And—most important—there were the beneficiaries of the Hamilton financial program. This "paper aristocracy" was day after day denounced by the Republican press as a threat to the whole fabric of republican forms and principles. The Senate reentered the picture in connection with this last class of "nobles"; when the Republicans captured the House, the Senate was described as the last resort of stockholders of the Bank of the United States, security holders profiting from assumption, and of all other beneficiaries of Hamiltonian finance.[60]

The "scatter-gun" nature of these attacks on an allegedly emerging American aristocracy indicate that the Republicans knew of no specific and overt plan to establish such an order, but were merely fearful of the general tendency of the Federalist program and of the Senate as its focus. It should be remembered, too, that much of this perturbation about the appearance of a new aristocracy in the United States was expressed by the scions of a real and present aristocracy—that of the Southern planters, who only feared nobles in city clothes. That many of these accusations were mere political propaganda is obvious.

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[58] Jefferson to Stephens Thomson Mason, Oct. 11, 1798, Lipscomb, *op. cit.*, X, 62; Jefferson to Elbridge Gerry, Jan. 26, 1799, *ibid.*, X, 77.

[59] For an extreme example of this attitude, see the *National Gazette*, Jan. 16, 1793.

[60] *Aurora* and *National Gazette* and other Republican newspapers, *passim*. For an example of the charge that the Senate was the last resort of security holders, see *Aurora*, Jan. 13, 1794.

The Federalists did, indeed, believe in a "high-toned" government: substantial salaries for public officials; titles, distinctions, and ceremonies designed to give the Federal Government prestige; more power in the hands of the National Government than Republicans thought safe, and emphasis on the indirectly elected Senate and President at the expense of the popularly elected House of Representatives, in which they had less effective support. They did sponsor an economic program which advanced the fortunes of the moneyed classes of the cities. That they were not loath to use coercion against their opponents was proved by the administration of the Alien and Sedition Acts. The more impractical of them may even have indulged in daydreams of castles and coronets and signing "baronet" after their names—although this was something quite different from making such dreams the goals of a practical political program.

But as long as the program the Federalists considered necessary to their practical interests could be effected by the system outlined in the Constitution, their opponents had little basis for their fears about introduction into the United States of hereditary orders. Although the Federalists did not get everything they wanted in the way of legislation, the essential features of their program *were* adopted and became a part of American life.

However—observing the Whiskey Rebellion, the appearance of "self-created" Democratic-Republican societies, Republican admiration for the French Revolution, and the near intransigence of the House of Representatives in making the appropriation to put the Jay Treaty into effect—many high Federalists feared that the existing political system could not last. They were fully convinced that their opponents were the couriers of anarchy and atheism. Even such leaders as Rufus King and George Cabot were quoted as saying the Union would be dissolved if the House of Representatives failed to honor the Jay Treaty as ratified by the Senate.[61] If the Nation should teeter on the brink of anarchy, then—and only then—would it be necessary to extend the terms of the President and the Senators, perhaps to lifetime terms, perhaps even to a hereditary basis. Almost every Federalist comment about the desirability of such a change was uttered in connection with an apprehension that the existing Government did not have sufficient durability to last. This is particularly clear in the writings of John Adams, who not only emphasized this position in his more formal political essays but expressed it in his private correspondence:

> I am a mortal and irreconcilable enemy to monarchy. I am no friend to *hereditary limited* monarchy in America. This I know can never be admitted without an hereditary Senate to control it, and an hereditary nobility of Senate in America I know to be unattainable and impracticable. I should scarcely be for it, if it were. . . . I am for having all three branches elected at stated periods, and these elections, I hope, will continue until the people shall be convinced that fortune, providence, or chance, call it what you will, is better than election. If the time should come when corruption shall be added to intrigue and manoeuvre in elections, and produce civil war, then, in my opinion, chance [i.e., hereditary descent] will be better than choice for all but the House of Representatives.[62]

In the eyes of posterity, this lack of faith in the durability of republican government was one of the most vulnerable of the Federalists' qualities, but goes far to put the discussion of an American monarch and "House of Lords" into proper perspective.

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[61] Entry in Jefferson's *Anas*, Mar. 1, 1798, Lipscomb, *op. cit.*, I, 422.

[62] Letter, Adams to Benjamin Rush, Apr. 18, 1790, Adams, *op. cit.*, IX, 566. Adams' "mortal and irreconcilable" enmity toward monarchy is not so apparent in some of his other writings.

Ambition—Or Retirement?

A variation of the "House of Lords" theme was the charge that the Senate, as already constituted, held powers so great as to be inconsistent with popular government, powers which its Members were not loath to use against the interest of the great mass of the people.

It will be recalled that in the Constitutional Convention and in the ratifying campaigns, fears were expressed that the totality of powers assigned to the Senate would enable that body to swallow up the other branches and establish a tyranny. The Senators were assigned a full share of the legislative power. They could, it was claimed, control the Executive through manipulation of the power to confirm his appointments to office. As a court of impeachment they could absolve Executive officers associated with them in corruption or tyranny. Their small number would give them the firmness and dispatch with which to overpower the unwieldy lower Chamber. They could use the treaty power to enrich themselves with foreign gold, and (because treaties are the law of the land) to usurp the legislative powers of the other House. They could use their long terms to entrench themselves firmly in the National Capital—either maintaining themselves in the Senate "for life" or obtaining appointments to high administrative office.

Many of these expressions of fear were so extravagant that they must be dismissed as campaign oratory, not to be taken too seriously. However, fears of Senate power were expressed often enough and earnestly enough to make pertinent the question of how valid they turned out to be in the actual conduct of the Senate during these highly critical formative years.

The Senate from the very beginning assumed its full stature as a coordinate branch of the legislature. Some of the constitutional fathers had anticipated that the Senate would not often originate legislation but would merely modify and perfect the proposals of the lower Chamber. How the idea of the Senate as a "council of revision" worked out in practice will be discussed more fully in chapter VI. However, it should be noted here that since the Constitution placed no hindrances against the Senate originating nonrevenue legislation, the upper Chamber promptly proceeded to do so. The Senate also proceeded radically to revise revenue bills and thus render largely nugatory the constitutional requirement that such legislation must originate in the lower Chamber, an action against which there was remarkably little outcry. Thus any idea that the Senate's nonlegislative powers would be offset by an inferior role in legislation was immediately dissipated.

Fortunately, experience also dissipated the idea that the Senate would use its powers for its own corrupt advantage.[63] With the possible exception of the oft-cited *Fishbourn* case, the Senate did not use the confirming power to impose its own candidates on the

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[63] Much of the current fear regarding use of patronage to further political ends was based on observation of the British system, under which the king could build up support in Parliament through judicious distribution of patronage. However, the American critics seem often to have ignored the fact that duplication of that system under the American Constitution was impossible since Members of Congress were prohibited from holding executive office.

President, although during the Adams administration it assumed considerable initiative in patronage matters.

On the contrary, the Senate declined to assert a power over the executive branch which even many Republicans wished it to have—that of confirming removals from, as well as appointments to, Federal office. The impeachment power turned out to be of comparatively minor importance, due partly to the Senate's recognition of the President's power to dismiss Federal officials at his own discretion. In the one instance in which the Senate had opportunity to use this power during this period, it failed to convict.

The Senate's use of the treaty power, specifically its ratification of the highly unpopular Jay Treaty, was so obscured by clouds of excited criticism that many believed that the upper Chamber had abused its prerogatives in the treatymaking field. However, calmer times brought calmer appraisal and the general conclusion that this was a proper use of the treaty power.

Again, contrary to fearful prophecies, Senators did not use their long terms or the prerogatives and influence of their office to entrench themselves in high places in the Federal Government.

In the first place, Senate service proved to be only a moderately effective steppingstone to high office in the Federal executive or judicial branches. Three-fourths of the Senators who served between 1789 and 1801 held no such office at all after leaving the Senate. In the cases of the one-fourth who did, there is nothing in the record to indicate that their position as Senator was exercised unduly to obtain for them Federal appointments their merits did not deserve.

Two of the 94 Senators who served during these years—James Monroe and Andrew Jackson—reached the Presidency. In the case of the Tennesseean, Senate service was a negligible factor, his reputation being made elsewhere. Monroe's 3½ years in the Senate led to the post of Minister to France, in which his experience was most unfortunate. The key factor in his rise to the Presidency was his standing in the Republican Party. Aaron Burr gained the Vice Presidency 4 years after a fairly conspicuous term as Senator, but his rise to prominence was due more to his position in New York State politics than to his Senate service.

Two of these early Senators, Samuel Dexter, of Massachusetts, and John Armstrong, of New York, achieved Cabinet rank, the former as Secretary of War and of the Treasury under Adams and the latter as Secretary of War under Madison. However, since their combined Senate service amounted to less than 2½ years, it can hardly be said that they owed these high posts to an "entrenched" position gained through long Senate service.

Two of these first Senators stepped up to the bench of the U.S. Supreme Court. William Paterson resigned his Senate seat to serve as Governor of New Jersey, which office he held at the time of his Supreme Court appointment. Oliver Ellsworth's leadership in the Senate, especially his authorship of the legislation establishing the Federal judiciary, was an important factor in his appointment as Chief Justice, but it cannot justly be claimed that the appointment was not based on demonstrated merit.

Three others received Federal district judgeships—John Sloss Hobart, of New York, in 1798 and Jacob Read, of South Carolina, and Elijah Paine, of Vermont, just before Adams' term expired in

1801. Ray Greene, of Rhode Island, received a similar appointment, but Jefferson was able to withhold his commission on a technicality. Rufus King while Senator turned down the Office of Secretary of State but sought and obtained the post of Minister to Great Britain. Charles Pinckney became Minister to Spain. Joseph Anderson, who began his Senate service in 1797, after 18 years in the Senate and highly important work on Finance Committees, was appointed Comptroller of the Treasury. A few others obtained such posts as Indian agent or collector of customs.

Of particular significance is the fact that, far from seeking high administrative office, several of these first Senators actually declined such appointments when offered them. King declined the office of Secretary of State in 1795, John Eager Howard, of Maryland, the post of Secretary of War in 1796. In fact, the posts of Secretary of State and Secretary of War went begging during Washington's administration, and the President expressed deepest discouragement over the unwillingness of capable men to accept them. George Cabot, of Massachusetts, in 1798 refused to serve as the Nation's first Secretary of the Navy. John Langdon, of New Hampshire, declined that office in 1801 as well as his party's nomination for the Vice Presidency in 1812. In 1801 Richard Stockton, of New Jersey, turned down Adams' offer of a circuit judgeship.[64]

Frequent senatorial refusals to accept executive posts paralleled Washington's reluctance to offer them to members of either House unless qualified men could not be found elsewhere, which was sometimes the case. This policy, which made membership in Congress a handicap rather than an aid in obtaining appointments in the executive branch, was apparently based on Washington's fear of giving the impression of collusion between the executive and legislative branches. However, on at least one occasion, when Senator Richard Potts, of Maryland, and Representative William Smith, of South Carolina, were being considered for appointment as Secretary of State, reluctance to "weaken" Congress by the appointment of dependable congressional supporters of the administration was an important factor, at least in the eyes of Hamilton, the President's principal adviser on appointments.[65]

Senate service was more likely to be followed by high office under the States than under the Federal Government. Fifteen of these first 94 Senators—Jonathan Trumbull, of Connecticut; Richard Bassett, of Delaware; James Jackson and Josiah Tattnall, of Georgia; John Henry, of Maryland; Caleb Strong, of Massachusetts; John Langdon, of New Hampshire; William Paterson and Aaron Ogden, of New Jersey; Jesse Franklin, of North Carolina; Charles Pinckney, of South Carolina; Isaac Tichenor, of Vermont; and James Monroe, John Taylor, and Wilson C. Nicholas, of Virginia—were elected Governors of their respective States after serving in the U.S. Senate. In at least a dozen cases Senate service was followed by judicial appointments under State governments and in more than two dozen cases by election to State legislatures.

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[64] This material concerning Senators' careers after leaving the Senate has been obtained from the biographical encyclopedias listed in ch. I of this study. See also John Alexander Carroll and Mary Wells Ashworth (completing the biography by Douglas Southall Freeman), *George Washington* (New York: Charles Scribner's Sons, 1948–57), VII, 322–326.

[65] Letter, Washington to Hamilton, Oct. 29, 1795, John C. Hamilton (ed.), *Works of Alexander Hamilton* (New York: J. F. Trow, 1850–51), VI, 53; Hamilton to Washington, Nov. 5, 1795, *ibid.*, VI, 61–62; Washington to Hamilton, May 15, 1796, *ibid.*, VI, 122.

For men whose talents were so widely recognized by their contemporaries, Senate service thus appeared to be only a moderately effective means of advancement in the Federal service. Certainly the facts proved wrong the claim that Senators would use their positions to obtain undue preference for appointments in the Federal executive or judicial branches.

This record did not impress Edmund Pendleton, Republican leader of Virginia and close friend of Jefferson. In a pamphlet published in October 1801 he viewed with alarm the "dangerously aristocratic" tendency of the Constitution in combining in the Senate legislative, executive, and judicial powers. He raised the possibility of a President increasing his power by rewarding faithful congressional supporters with Federal appointments, especially judicial offices—thus presenting the dark picture of Congress legislating, the President appointing, the Senate confirming, and the judges deciding—all with the aim of corruptly keeping the President and themselves in power. As a remedy he recommended, among other changes, the transfer of the power of making appointments of judges and stationary foreign ministers from the President to Congress, depriving the Senate of all other executive power, and rendering Members of Congress and judges, while in office and for a limited time thereafter, incapable of accepting any Federal office except those of President and Vice President. This tilt against a nonexistent evil appears to have excited little enthusiasm at the time, especially since Jefferson and the Republicans had now taken over the reins of the Federal Government.[66]

Neither did the developments during the period under study fulfill the dire prophecy that Senators would somehow—just how, the critics did not explain—use inside influence to maintain themselves in the Senate term after term, perhaps for life. In fact, in a very large number of cases the Senators did not serve out even a single 6-year term.

A surprisingly large number of Senators, far from seeking to entrench themselves in the National Capital, resigned before their terms were completed and returned to their home States. Of the 94 Senators who served between 1789 and 1801, no less than 33 resigned, within this period, before their terms were completed. Nine resigned in the single year 1796. Only six of the total number who resigned did so to accept Federal executive or judicial posts. Five died in office during the period, while one (Blount) was expelled. Frequent resignations continued for many years, a total of 35 Senators resigning in the period 1801–13.[67]

This high rate of resignations was accompanied by a comparatively low rate of reelection. Of the 29 Senators who served in the First Congress, only 11 were reelected to succeed themselves, and 7 of these had drawn the short terms when the Senate was originally classed (i.e., divided into three groups with terms expiring in 2, 4, and 6 years). Only 2 Senators served throughout the whole period from 1789 to 1801. In a significantly large number of cases Senators refused to stand for reelection—because they were weary of Senate service, because their private affairs required attention, because they wished to run for State office, and for other reasons. Due to such frequent resignations and comparatively infrequent reelections, the average length of service of these first 94 Senators, including service after 1801, was less than 5 years.[68]

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[66] Robert Leroy Hildrup, *Life and Times of Edmund Pendleton* (Chapel Hill: University of North Carolina Press, 1939), pp. 318–322, quoting the *Richmond Enquirer*, Dec. 11, 1828. Originally published in 1801, the pamphlet was reprinted during the controversy over the "Tariff of Abominations."

[67] *Biographical Directory of the American Congress*, 1774–1949 (Washington, D.C.: Government Printing Office, 1950), *passim*.

The brevity of these terms of service becomes even more striking when compared to the situation in the 20th century. Taking for example the 109 men who sat in the Senate any time during the 71st Congress (1929–31), one finds that they had, by the time they completed their service, worn the senatorial toga an average of more than 14 years. Resignations, on the other hand, are now quite rare.[69]

With the average Senator during the period 1789–1801 serving less than a single 6-year term—many of them remaining in office only a few months—Senate service was given a somewhat casual air. With respect to length of service, this was not the type of upper chamber envisioned by the framers of the Constitution, who pictured a much more stable body. However, these short terms went far to disprove the dark forebodings of those who saw the Senators as potential "lords" serving lifetime terms.

Yet, despite the fact that the fears of an all-powerful, aristocratic Senate were without valid foundation, the Republicans' constant hammering at aristocratic pretensions, real or fancied, was not without important effect. The passing years marked a gradual but definite retreat from the high position the Senate tried to carve out for itself when the First Congress opened. Talk of regal titles ceased abruptly. Marks of deference from the House in communications between the two Chambers were not forthcoming and the claim to them was forgotten. The salary differential in favor of the Senate was dropped after a single year in effect. The Senate opened its doors to the public. There was considerably less emphasis on ceremony and distinctions of rank. When the Republicans gained control of the Senate in 1802, an era was definitely ended and the retreat reached its logical climax.

Many Federalists had in mind a Senate with aristocratic features out of harmony with American political development. The Republican opposition, for all its inconsistencies and often unfair partisanship, rendered a useful service in helping to establish the Senate in a position consistent with the spirit of American life. This service was not only one to the march of democracy but to the Senate itself, which remained unscathed and even increased its prestige when more aristocratic upper chambers throughout the Western World were shorn of many of their cherished powers.

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[68] *Ibid., passim.* This figure would have been somewhat higher had it not been for the fact that two-thirds of the Senators drew 2- or 4-year terms in 1789.

[69] *Ibid., passim.* The rate of reelection to the House was much higher during the Federalist period. Thirty-six out of the 65 Members of the first House were reelected in 1791. Even in the so-called "Revolution of 1800" 55 out of 106 House Members retained their seats.

CHAPTER VI

SENATE RELATIONS WITH THE HOUSE: "A COUNCIL OF REVISION"

SUPERIOR WISDOM AND STABILITY?

It will be recalled that one of the roles of the Senate as envisioned by the framers of the Constitution was that of a council to revise the imperfect work of the popularly elected branch. In line with this idea, the Senate was to be composed of men of greater age, wisdom, knowledge, stability, and detachment than the Members of the House, who might be led astray by inexperience, rashness, and popular passion. The Senators' superior qualities were to be insured by higher age and citizenship requirements, longer terms, and indirect election.

As previously pointed out, the question of whether the 94 Senators who served from 1789 to 1801 were a superior group of men compared to the several hundred who served in the House of Representatives involves so many subjective considerations as to be impossible of answer with any degree of authority.

Of the qualities sought, only age can be measured with accuracy. In this characteristic there was comparatively little difference between the membership of the two Houses, in spite of the intention of the framers of the Constitution. In 1789 the difference was less than 3½ years; 10 years later the difference had narrowed to about 2½ years.[1] Thus in its narrowest sense, the term "council of elders" certainly cannot be taken too seriously in considering the role of the Senate in this early period.

Yet the idea of the Senate as a more experienced body to revise the measures of a more sophomoric House received some support from the fact that during the period 1791 to 1801, 22 House Members—about one-third of the Senators elected after the First Congress—were "promoted" to the Senate, while election to the House after previous membership in the Senate, which happened occasionally, was considered somewhat of a "demotion." Senator Theodore Sedgwick of Massachusetts was heartily applauded by his Federalist friends in 1798 for his "patriotic sacrifice" in giving up reelection to the Senate so that he could run for the House and defeat a certain "Jacobin" who might otherwise have been elected to that body. (He was successful and was promptly elected Speaker.) House Members elected to the Senate included Jonathan Dayton of New Jersey and Jonathan Trumbull of Connecticut, both of whom had been Speaker of the lower House, as well as several others who had served conspicuously there. The legislature of Connecticut even made it a semiofficial policy to elect House Members to the Senate as part of a general system of promoting Government officers.[2] Election by the State legislatures insured that the men chosen for the Senate had at least some statewide reputation, while some of the men elected to the House were obscure indeed. However, since obscurity does not necessarily mean lack of high qualities, the comparison is perhaps unfair. Some of the outstanding leaders of both parties—men like James Madison, Albert Gallatin, Fisher Ames, William Smith and John Marshall—brought distinction to the lower House.

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[1] These figures have been determined from dates of birth shown in *Biographical Directory of the American Congress, passim.*

Part of the Senate's role as a "council of revision" was that of defender of property against threats from the popularly elected branch. In judging the need for such a defense, one must bear in mind that the right to vote for House Members was at that time usually limited by property qualifications. However, since under the Constitution all those eligible to vote for members of the most numerous branch of the State legislatures were eligible to vote for Federal Representatives, the framers apparently feared that the latter might show interest in radical financial schemes such as those proposed in several of the State legislatures during the Confederation period. As pointed out in chapters IV and V, the State legislatures did send to the Senate men of wealth and high social standing—men who did give stronger support than their House brethren to a program explicitly designed to attract the adherence of the wealthy financial and commercial elements to the Federal Government. This is no doubt what the so-called "Thermidorians" of 1787 intended, although delegates from agricultural States, like Madison of Virginia, in championing the Senate as the bulwark of property were probably thinking especially of agricultural property. As it turned out, men whose wealth was invested in commerce and finance were firmly convinced that the Senate was indeed faithfully fulfilling its role as a conservative council to defend property, while men whose wealth lay in agriculture considered the Senate as actually hostile to their interest. The observer's opinion of the "superior wisdom" of the Senate would consequently largely depend on whether he wore the rose-colored spectacles of Federalism or the darker lens of the Republican cause.

The question of whether or not the Senate was more "stable" than the House involves a similar dichotomy of viewpoint. The Senate clearly was less responsive to popular pressures than the House. Not only did longer terms and indirect election contribute to this result, but so also did the character of the Senators themselves—many of whom took particular pride in their aloofness from the opinions of the multitude. The dignity of the Senate Chamber contrasted with the frequently tumultuous proceedings of the Chamber below. The Senators consistently resisted what they considered too close ties with Revolutionary France and the often misplaced enthusiasms of her adherents in America. Senate action on the Bill of Rights amendments was more politically orthodox than that of the House in that the amendment (which Madison said he prized above all the others) prohibiting the States from infringing on personal rights was eliminated.[3] The Senate often rejected House private pension bills which the Senators considered unjustified. It took an especially tough resistance to the popular torrent for the Senate to ratify the Jay Treaty in 1795—an action which following generations have generally applauded.

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[2] William Hindman to Rufus King, Dec. 8, 1798, King, *op. cit.*, II, 481; *Gazette of the U.S.*, Dec. 5, 1798; Oliver Wolcott, Jr., to Oliver Wolcott, Sr., Apr. 18, 1796, George Gibbs (ed.), *Memoirs of the Administrations of George Washington and John Adams, Edited from the Papers of Oliver Wolcott, Secretary of the Treasury* (New York: William Van Norden, 1846), I, 327–328.

On the other hand, the Senate sometimes exhibited a rash aggressiveness all its own, which contrasted sharply with the air of judicial calm which the framers had looked for in this council of revision. The campaign to give the President a lofty title and themselves marks of deference was nothing if not indiscreet. It was the Senate which took the lead in pushing through the ill-advised Sedition Act. In 1798 the Senate's Federalist majority would probably have sought a declaration of war against France if it had not been restrained by the prospect of defeat in the House, which on this occasion provided the necessary stability to the Nation.

The Senate's Federalist majority usually took a more liberal attitude toward Government spending (for such purposes as Federal salaries) than did the lower Chamber. Thus instead of the Senate alone raising a restraining hand against rash action, either House was likely to check the "impulsiveness" of the other. Of course, if it is merely claimed that a second chamber will restrain precipitate action simply by adding more obstacles and requiring more time for measures to go through the legislative mill, the Senate—as well as the second house in any bicameral system—could hardly fail to be a success.

INITIATIVE IN LEGISLATION

In one respect, however, the Senate during this period proved to be a true council of revision: Year after year, the great bulk of the laws originated in the lower House, so that by far the greatest proportion of the Senate's time was spent in studying and amending House measures. This dependence on the House to take initial action on legislation was sometimes so extreme that the Senate had little to do at the beginning of a session and had to work with feverish haste toward its close, presenting an unfortunate lack of balance in the legislative calendar which will be discussed in a later chapter.[4]

This is not to say that the Senate did not introduce important legislation. Quite the opposite is true, since—contrary to the expectations of many members of the Constitutional Convention—many of the most significant laws passed during the period originated in the upper House. Lane W. Lancaster in a well-substantiated article, "The Initiative of the U.S. Senate in Legislation, 1789–1809," showed that, contrary to current thinking at the time he wrote, the Senate from the beginning of the Government under the Constitution was "quite active" in originating legislation. His investigation revealed that of 895 public acts passed during the first 10 Congresses, 195—or slightly more than 22 percent—originated in the Senate. Among these 195 were some of the most important. The Senate during that period was especially active in introducing legislation in the following fields: (1) courts and judicial procedure, (2) organization of State and Territorial governments, (3) foreign affairs (particularly prominent when war was threatening), and (4) finance, coinage, and banking.[5]

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[3] *Senate Journal*, 1st Cong., 1st sess., Sept. 3, 1789, pp. 116–131. See also Robert Allen Rutland, *Birth of the Bill of Rights, 1776–1791* (Chapel Hill: University of North Carolina Press, 1955), pp. 210–213.

[4] See ch. XII, *infra*.

Senate initiative in legislation was particularly vigorous in the second session of the Fifth Congress, when the large and well-organized Federalist majority in the upper Chamber sponsored the bulk of the legislation to put the Nation in readiness for possible war with France.[6]

Because of the Senate's special responsibility in foreign affairs, it is perhaps not surprising that the upper House took the lead in introducing legislation in that field. However, in view of the fact that the Constitution expressly provides that revenue legislation must originate in the lower House, it is quite surprising that the Senate took the lead in proposing much of the financial legislation. But this it did. During the 1790's, the Senate originated the acts incorporating the first Bank of the United States, providing for punishment of frauds on the bank, establishing the U.S. Mint, regulating the value of foreign coins, and providing for punishment of counterfeiting.

During these formative years, House Members were extremely conscious of their role as direct representatives of the people, which was the main basis upon which the framers, following colonial and State precedents, provided that strictly revenue legislation must originate in their Chamber. During the first session of the First Congress, the House defended this prerogative by making the first Tariff Act temporary. With no time limit, attempts to revise that act would have been subject to defeat in the Senate and to veto by the President.[7] However, the Senate during this period even introduced revenue legislation. During the third session of the First Congress, the Senate originated a bill to extend the first revenue act (which had originated in the House). In the Third Congress a Senate bill aimed to remove the duties hitherto laid upon arms and ammunition. The Senate also originated several acts amending administrative provisions of other revenue laws.[8] In the Sixth Congress, the Senate concerned itself with the preparation of revenue legislation to the extent that a committee of three Federalists presented a bill making it the duty of the Secretary of the Treasury to "digest, prepare, and lay before Congress" at the beginning of each session a report on the Government's finances, with estimates of revenue and expenditures and plans for improving or increasing the revenue.[9]

Lancaster stated that the constitutional question was raised only once—in the case of a Senate bill relating to passports for ships and directing that certain fees be paid to collectors at ports. This bill was unanimously rejected by the lower Chamber and a House bill substituted.[10]

Senate introduction of the bill establishing the Bank of the United States was especially significant, not only because of its importance—Jefferson called it the chief source of opposition to the administration—but because Hamilton's report on the subject was addressed to the House, not the Senate. Even so, criticism of Senate introduction of this bill was not based on opposition to the Senate introducing financial legislation, but on the nature of the legislation itself and on the fact that this "monster" was born in the "dark recesses" of a Senate whose doors were closed to the public.

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[5] Lane W. Lancaster, "The Initiative of the U.S. Senate in Legislation," *Southwestern Political and Social Science Quarterly*, IX (June 1928), 67–75.

[6] For the role of the Senate's Goodhue committee in preparing this legislation, see ch. XVI, *infra*.

[7] Letter, Fisher Ames to George Richards Minot, May 16, 1789, Ames, *op. cit.*, I, 39.

[8] Lancaster, *op. cit.*, p. 74 fn.

[9] *Annals*, 6th Cong., 1st sess., Apr. 28 and May 1, 1800, pp. 168, 171.

[10] Lancaster, *loc. cit.*, citing *Annals*, 4th Cong., 1st sess., p. 1405.

The record thus clearly corroborates Lancaster's contention that the Senate during these early years was "quite active" in originating legislation. But this is far from saying that the House did not introduce by far the larger portion of the laws passed during that period. Lancaster's own figures show that the House originated 78 percent of the laws passed from 1789 to 1809. The figures for the first 12 of these 20 years are even more striking, and explain why the Senate spent most of its time considering and revising House bills.

During the precedent-making first session of the First Congress, the Senate established itself as a largely revisory body. During that session, a total of only five bills were introduced in the Senate. Three of these dealt with the Federal judiciary (establishing the system, regulating processes, and defining punishment for crimes against the United States), one established the postal system on a temporary basis, while the fifth was a private bill. Four of these bills—all but the measure defining punishment for crimes—passed.[11]

In the meantime, the House of Representatives originated and sent to the Senate 26 bills and the highly important resolution proposing constitutional amendments. These House bills, among other things, established the revenue system, the executive departments, and Federal salary scales; appropriated funds for the Federal service; arranged for the government of the Northwest Territory; regulated maritime commerce and established lighthouses, beacons, and buoys; and designated the Susquehanna as the site of the Federal Capital. Among the bills originating in the House was the one establishing the Department of Foreign Affairs, which involved a province in which the Senate had special responsibilities.[12]

The importance of the Federal judicial system, framed almost wholly by the Senate, has been cited as proof of the early Senate's prominent role as originator of key legislation. The key nature of this legislation cannot, indeed, be questioned, and it is readily admitted that here the upper Chamber did the original work on legislation of a high order. However, these bills involving the judiciary constituted the only major legislation originated by the Senate in its first session. The precedent was thus established that most legislation would originate in the lower house, while the Senate's principal role would be that of a revisory body.

To this task of revising measures proposed by the House the Senate addressed itself with vigor. Of the 26 bills sent up by the House, the Senate rejected 2, while a third (fixing the capital on the Susquehanna) died in conference between the two Houses in the closing hours of the session. Of the remaining 23, the Senate modified at least 20—some of them radically. To the House bill for registration of vessels and regulation of the coasting trade, the Senate added 69 amendments. On June 11, 1789, the Senate adopted 40 amendments to the House bill laying duties on imports. To the House bill laying a duty on tonnage, the Senate added nine amendments.[13] In the following years, the Senate continued to subject House bills to severe scrutiny and to amend a large proportion of them. The frequency with which the lower Chamber acquiesced in Senate amendments tends to indicate that these amendments were of some value in improving legislation.

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[11] *Annals*, 1st Cong., 1st sess., *passim*.
[12] *Ibid.*, *passim*.

The amendments to the tariff bills are especially noteworthy, since they show that the Senate had no inhibition at all about making use of its constitutional right to amend revenue bills, and there was apparently no objection to the Senate exercising its amending power in this field, in spite of British and colonial precedents to the contrary.

During the entire period under study the situation was very much the same. Out of 54 bills and 1 joint resolution passed by both Houses during the first session of the Fourth Congress, the Senate originated 8 bills, or about 15 percent of all the measures passed. In the second session of the Fifth Congress, the Senate's energetic Federalist majority threw precedent aside and, availing itself of popular resentment against France, pushed through an extensive preparedness program. During that session the Senate originated 17 public and 4 private laws, numerically only about 24 percent of the total legislative output but a more significant share of the important legislation. This greater Senate initiative was short lived, however. Two years later, in the second session of the Sixth Congress, the Senate looked to the House to originate almost the entire legislative program, the upper Chamber sponsoring only two bills which passed both Houses, or less than 6 percent of the total. One of these dealt with the government of the District of Columbia; the other was a private bill. During the whole session only 4 bills were introduced in the Senate, one of which was defeated by the Senate itself and one by the House.[14]

Demands for introduction of private claims bills were extremely insistent during this period, since many veterans of the Revolution had claims for pensions or other compensation which had not been settled by the time the new Government was inaugurated. In the thankless and time-consuming task of sifting these claims and sponsoring legislation to provide compensation when considered justified, the House did most of the spadework. Most of the work was done by a House claims committee, service on which was so arduous that in at least one instance the health of a member was impaired. At one time there were between 90 and 100 private cases on the lower Chamber's list of unfinished business. The House carefully investigated the merits of these claims and eliminated all but a fraction of them. The Senate's role was principally that of a reviewing body, sponsoring comparatively few private relief bills of its own but looking with its usual critical eye on those sponsored by the House, often refusing to give its approval.[15]

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[13] *Senate Journal*, 1st Cong., 1st sess., June 11, 1789, pp. 47–50; June 17, 1789, pp. 51–52, and *passim*.

[14] These statistics have been compiled from the *Annals* and the *Senate Journals*, 1st to 6th Congresses, *passim*.

It should be noted in passing that bills were usually introduced by committees acting under instructions to do so, rather than by individual members. This practice severely restricted the number of bills introduced. See ch. XIII, *infra*.

[15] *Annals*, 4th Cong., 1st sess., Dec. 16, 1795, p. 130; *ibid.*, 5th Cong., 1st sess., May 18, 1797, p. 61.

The number of cases considered by this claims committee seems very modest in comparison with the burdens imposed on such committees today. However, it should be remembered that the members had practically no staff help in the early period and were forced to do this spadework personally.

The comparatively minor role of the Senate in originating legislation during this early period contrasts sharply with the situation in modern times. In the 83d Congress, for example, the Senate originated 34.7 percent of the public laws and 38.7 percent of the private laws, or about 37 percent of the total legislative output.[16]

With the House initiating the lion's share of the total number of laws, it is not particularly surprising that appropriation bills originated in the lower Chamber during this period—in spite of the fact that the Constitution allowed the Senate to originate such bills, the prohibition against initial Senate action applying only to "revenue" bills.[17] The theoretical right of the Senate to introduce appropriation bills was admitted in House debate, and the Senate on one occasion in 1795 instructed one of its committees to prepare a bill to appropriate further funds for a program of trade with the Indians. President Washington, on the other hand, apparently expected the House to originate appropriations, since in his last annual message he addressed to the "Gentlemen of the House of Representatives" only, his remark that estimates of necessary appropriations would be submitted by the proper departments.[18]

Thus, with respect to its legislative functions, the Senate did act during this period principally as a council to revise measures proposed by the House. This explains in part why House service was considered more exciting and more likely to bring an ambitious young politician to public notice.

TUG OF WAR: SENATE VERSUS HOUSE

This revisory role assumed by the Senate did not mean that the House admitted that the upper Chamber had a wisdom so superior that it was qualified to revise the "imperfect" work of their own Chamber.

In the first session of the First Congress, some House Members bitterly denounced the Senate for its amendment to the House tonnage bill striking out the discrimination in favor of nations with which the United States had treaties (e.g., France). Vining of Delaware (a future Senator) hoped the House would persevere to the end rather than suffer the "indignity" of receding from its stand, accusing the Senate of arrogance in refusing to compromise. Page of Virginia declared he would rather see the bill lost altogether than accept the Senate amendment and thereby establish a precedent of submission to the other Chamber. However, it was pointed out that disagreement was inevitable where both Houses had power to propose amendments and that if the honor of the House demanded that it adhere to its stand, the same could be said of the Senate. These calmer voices prevailed and the House finally accepted the Senate amendment 31 to 19.[19]

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[16] U.S. Congress, House, *Calendars of the U.S. House of Representatives and History of Legislation*, final ed. (Washington, D.C.: Government Printing Office, 1954), pp. 42–93.

[17] Haynes did not believe that the final wording in the Constitution reflected a deliberate effort on the part of the framers to confine within the narrowest limits the lower Chamber's exclusive power over introduction of finance bills, since the expressions "money bills" and "revenue bills" were often used synonymously in both America and England at that time. See Haynes, *Senate of the U.S., op. cit.*, I, 455.

[18] *Senate Journal*, 4th Cong., 1st sess., Dec. 22, 1795, p. 35; *Annals*, 4th Cong., 1st sess., Mar. 10, 1796, p. 499; *ibid.*, 4th Cong., 2d sess., Dec. 7, 1796, p. 1596.

The precedent of House initiation of appropriation bills was established, although not always subsequently accepted. Hoar stated that the custom of House initiating all appropriation bills actually decreased the power of House Members since only the handful who are members of conference committees have opportunity to discuss the vast field of legislation covered by Senate amendments. See Haynes, *Senate of the U.S.*, I, 455–457.

House Members, especially in the very early years, often scoffed at what they regarded as excessive Senate concern with trivialities, such as a title for the President. On another occasion—presentation to the House in 1793 of a Senate bill to alter the flag to recognize the admission of Vermont and Kentucky to the Union—a House Member professed that he—

> could not conceive what the Senate meant by sending them such bills. He supposed that it must be for want of something better to do. He should indulge them, but let us have no more alterations of this sort.[20]

Two years later, when President Washington sent to the House a letter from the Secretary of War quoting with approval a bill regarding defense of the southwest frontier which had been passed by the Senate but defeated by the House, House Republicans—Nicholas, Page, Giles, Lyman, Smilie, Madison—took the deepest umbrage at the implication that the Senate was wiser than the House. Six years before, Madison had gone out of his way to express a friendly attitude toward the upper Chamber, but now party feeling was high and the Republicans controlled the House, the Federalists the Senate.[21]

Some House Members professed to fear the power of the small, closely knit Senate with its special prerogatives.[22] This was especially true up to 1795, when the Senate sat behind closed doors, refusing to allow even House Members to visit their Chamber, although Senators were freely admitted to the House floor. Such apprehensions about attempted coercion by the Senate were not entirely without foundation. In 1797, Senator Uriah Tracy, himself a former House Member, explicitly stated that the Senate majority would prevent the House from adjourning unless the lower Chamber passed a preparedness program desired by the Senate:

> This [preparedness legislation] will depend in some measure on the House of Representatives, you know; but I venture to say, that the gentlemen will have to stay here till they sweat with hot weather as well as anger, if they do not readily adopt some such salutary measures, and especially if they are hesitating about a revenue; for although the Senate cannot originate a revenue bill, it is very clearly remembered with us that the House cannot adjourn, but for the space of three days, without our consent. This may look too much like a threat; but, sir, it must be remembered that desperate cases require desperate remedies. I am, however, of opinion that a clear majority of the Representatives is federal.[23]

Friends of the Senate, on the other hand, professed to fear what they claimed was a Republican movement, under the influence of the French Revolutionists, to concentrate all Federal power in a single, popularly elected Chamber—a step which the Federalists considered synonymous with despotism. Refusal on the part of some extreme Republicans to brook a single word of criticism of the system of the "glorious French Republic" seemed to give some basis for such fears.

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[19] *Annals*, 1st Cong., 1st sess., July 6, 1789, pp. 639-643.

[20] *Ibid.*, 2d Cong., 2d sess., Jan. 7, 1793, p. 165.

[21] *Ibid.*, 3d Cong., 2d sess., Jan. 12, 1795, pp. 1072 ff.

[22] For an example of such apprehensions expressed by a House Member, see letter, Representative John Steele to Joseph Winston, July 20, 1790, H. M. Wagstaff (ed.), *John Steele Papers* (Raleigh, N.C.: North Carolina Historical Commission, 1924), I, 72.

[23] Letter, Tracy to Gov. Oliver Wolcott, Sr., of Connecticut, May 27, 1797, Gibbs, *op. cit.*, I, 538-539.

The source of the most bitter conflict between the two Houses during this period was the question of whether or not the House was morally obligated to pass appropriation bills to put into operation treaties ratified by the Senate and to pay diplomatic officers confirmed by the Senate. Since this controversy involved the executive powers of the Senate, it will be discussed in connection with the Senate's role as advisory council to the President. It should be borne in mind here, however, because it contributed significantly to the ill will which sometimes marred Senate-House relations.

During these formative years, there did develop in both the Senate and the House the beginning of an *esprit de corps*—a devotion of men for their own Chambers independent of other loyalties. However, most of these Senate-House controversies did not, at heart, reflect a conflict between Senate and House as such, but between men of Federalist and Republican persuasions. What House Republicans objected to most about the Senate was the fact that it was the central stronghold of Federalism. Whenever they cast any aspersions on the upper Chamber, their Federalist colleagues in the House quickly jumped to their feet in the Senate's defense. Senate and House Federalists cooperated in their legislative endeavors—as did Senate and House Republicans in theirs. While President of the Senate, Jefferson had much closer contacts with House Republicans than with the Federalist majority of the Chamber over which he presided.

While the Senate did serve during this period as a revisory council in the sense that its main function was not to introduce legislation but to review the measures of the lower House, this was not done in the spirit anticipated by the framers of the Constitution. These men anticipated horizontal conflicts between popular but often ill-considered measures sponsored by the popularly elected House and the wiser and calmer counsels of a conservative Senate. What actually developed was a vertical conflict between Senate and House Federalists on the one side and Senate and House Republicans on the other. Therefore, in a more fundamental sense the men who forged a living Congress from the constitutional blueprint did not follow the design of the framers, who apparently had not expected the polarization of the Nation into two conflicting political parties.

SENATE AND HOUSE IN HARNESS

This chapter has highlighted instances of conflict between the two Houses and possibly left the impression that relations between the two Houses from 1789 to 1801 presented only a dreary picture of distrust and conflict. This was not the case. Although the constitutional grant of nearly equal lawmaking power to each of the two Houses gave every opportunity for a legislative impasse—in fact, for an abortion of the new Government by congressional failure to agree on a program to make the constitutional framework a living organism—the two Houses during this formative period were able to agree on essential measures, adopt a far-reaching and constructive legislative program, and prove themselves effective organs of government.

Joint Senate-House committees arranged for the inauguration of Washington and solved many of the problems posed by the organizing of Congress, such as the framing of rules governing conference committees and other relations between the two Houses.[24] The conference committee proved to be an effective instrumentality in reconciling differences between bills in their Senate and House versions; only rarely did measures fail because of failure of conferences to agree or of the two Chambers to accept conference reports. In fact, Congress from its very first session showed a great deal of finesse in its use of the conference committee.[25]

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[24] Unfortunately, the joint committee was not subsequently utilized to the degree its potential usefulness merited. See ch. XIII, *infra*.

With a few exceptions, each House gave respectful consideration to the amendments of the other branch. To the first great measure originating in the Senate, the bill establishing the Federal judiciary, the House added no less than 52 amendments. The Senate agreed to all but four and part of a fifth, while the House in its turn receded from the amendments to which the Senate disagreed.[26] To the first vital measure sent to the Senate by the House, the bill placing duties on imports, the upper Chamber added 40 amendments. The House accepted 19 of these and part of a 20th, and rejected the others. A conference committee appointed to consider the disagreements on this bill as well as the bill placing duties on tonnage was able to frame a compromise acceptable to both Houses. In the next Congress, the Senate added 72 amendments to a bill establishing post offices and post roads—a highly complicated measure involving a host of local pressures. The House accepted all but one and part of another of these changes, and the Senate acceded to the House on these.[27] The *Annals* frequently recorded action such as: "The House [Senate] immediately took said amendments into consideration and concurred therewith." The critical moment in the relations between the two Houses was faced and safely passed in 1796, when the lower House, after great soul searching and for a variety of reasons, passed the appropriation bill to put the Jay Treaty into effect.

Contacts between individuals of the two Houses were frequent and friendly. Maclay's *Journal* described frequent occasions when Members of the Senate and House delegations from Pennsylvania worked in unison. The same was true of other delegations. "Think of these Things and I will call and consult with you—nothing must be omitted to accomplish the Assumption," wrote Senator Theodore Foster of Rhode Island to Benjamin Bourne, a colleague in the House.[28] Senator Richard Henry Lee of Virginia recorded that he attended a House committee session and found its chairman "sensible, liberal, and accommodating." Amendments failing in one House were submitted by their sponsors to friends in the other for introduction there.[29]

Their own business finished, Senators often went downstairs and attended the House debates and thereby familiarized themselves with the peculiar problems of the lower Chamber. This interest was sometimes intense. Senators not only admired the oratorical efforts of House Members whose opinions they shared, but doubtless were at least somewhat influenced by the arguments advanced by others. On the other hand, it is at least a reasonable conjecture that House

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[25] For a discussion of early use of the conference committee, see ch. XIII, *infra*.

[26] *Senate Journal*, 1st Cong., 1st sess., Sept. 19, 1789, p. 139; *ibid.*, Sept. 21, 1789, p. 140.

[27] *Annals*, 1st Cong., 1st sess., July 1, 1789, p. 643; *Senate Journal*, 1st Cong., 1st sess., June 11, 17, 19, 24, 1789, pp. 47–54; *ibid.*, 2d Cong., 1st sess., Jan. 30, 1792, and Feb. 3, 1792, pp. 104–114, and *passim*.

[28] Quoted in Roger Sherman Boardman, *Roger Sherman, Signer and Statesman* (Philadelphia: University of Pennsylvania Press, 1938), p. 308. The letter is in the Emmet collection in the New York Public Library.

[29] Letter, Lee to Charles Lee, Aug. 28, 1789, Ballagh, *op. cit.*, II, 498; letter, Representative William Smith to Otho Holland Williams, July 17, 1789, *Calendar of the General Otho Holland Williams Papers in the Maryland Historical Society* (mimeographed) (Baltimore: Maryland historical records survey project, Works Progress Administration, 1940), p. 182.

Members were flattered by the presence of these senatorial auditors and sometimes sought their approval by their words or deeds.

Perhaps most important of all, relations between Senate and House Members in leisure hours were close and amiable. Members of the two Houses often shared quarters and meals at the same boardinghouses. Unfortunately, congressional social life, while not sharply divided between Senate and House, tended in time toward the same party polarity that characterized political action. Federalists tended to live together in the same boardinghouses and attend the same dinners and other social functions, not excluding Fourth of July celebrations. The same was true of the Republicans.

Thus, in this early period the Senate served as a "council of revision" only in the limited sense of initiating few measures but spending most of its time modifying measures proposed by the lower Chamber. On the other hand, the Representatives did not admit that the Senate was superior in wisdom or talent but considered it (in its lawmaking functions) as merely a legislative Chamber coordinate with their own. Experience from the very beginning did, indeed, prove that in legislative matters the two Houses were coordinate Chambers, and as time went on the "revisory council" theme was rarely emphasized. In opening its doors to the public—a subject to be discussed in chapter XIV below—the Senate gave up one of the most obvious expressions of the "council" idea. Meanwhile, increases in Senate membership began to contribute to the same end. Most important of all, the lines of political conflict were generally not drawn horizontally between Senate and House as such, as anticipated by the fathers of the Constitution, but vertically between Federalist and Republican forces with combatants drawn from both Houses. These participants proved again that the political process is not merely that of a machine revolving according to the plan of its inventor but the clash of forces using governmental machinery in the most practical ways to achieve their own ends.

CHAPTER VII

AN ADVISORY COUNCIL TO THE PRESIDENT: APPOINTMENTS

> * * * [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law * * * (United States Constitution, art. II, sec. 2).

With these words, and those relating to treaties, the framers of the Constitution made the Senate an executive council to advise and restrain the President. In so doing, they hoped they had solved one of the critical problems of the Convention—that of providing effective and responsible leadership in the executive branch while at the same time guarding the Nation against Presidential tyranny.

As an advisory council with respect tc appointments, the Senators were not only to prevent arbitrary use of executive authority but were to furnish the President with information regarding the qualifications of men considered for Federal appointments. Coming as they did from all sections of the country, the Senators would have information regarding possible candidates which might not be available to the President. The small size of the Senate—only 22 Members in 1789, only 26 after the ratifications by Rhode Island and North Carolina—lent itself to the informal deliberations expected of an advisory council, as did the closed-door policy the Senate adopted at its first meeting.

To the charge that the Senate would use its confirming power to exalt itself, the Constitution's friends had pointed to the plain wording of that document, which gave the Senate a negative power only, the President alone having the initiative in making nominations.[1] However, since experience has amply proved that constitutions and laws can be followed in letter while flouted in spirit, it remained for the President and the Senate during this formative period to work out a pattern of practical procedures tc fulfill the constitutional provisions concerning appointment and confirmation.

WASHINGTON SEEKS ADVICE ELSEWHERE

As mentioned in chapter II above, some members of the Constitutional Convention believed that the Senate's status as advisory council to the President should go beyond the technical requirements of the "advice-and-consent" provision finally put into the Constitution and should be as much a part of the executive as of the legislative establishment. Designating the Vice President of the United States as President of the Senate gave point to this belief. Washington himself at one time had some such thoughts in mind, anticipating an

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[1] Alexander Hamilton in *The Federalist*, No. 66 and No. 76.

Executive Chamber in the permanent Capitol where he could frequently meet with the Senators for informal advice.

However, when the time came to put theory into practice, Washington acted somewhat differently. His chief source of advice was not the Senate as a body, nor individual Senators, but members of his Cabinet and James Madison, House Member from Virginia.

Washington had been anxious to see his friend Madison elected to the Senate, where he believed he could be more useful because of the Senate's role in treaties and appointments.[2] But the opposition of Patrick Henry defeated Madison in the senatorial election. Subsequently Madison was elected to the lower House, which was his own choice.

Madison was by all odds the leading Member of the first House of Representatives, not only initiating much of the legislation but occupying the floor far more often than any of his colleagues. During this time he was also the President's closest confidant. It was to the Virginia Congressman that Washington entrusted the task of finding lodgings for the President in the Capital, and as he began his Presidential duties he relied heavily upon Madison's advice and assistance in the difficult tasks of his office.

A few days before the first Congress was scheduled to meet, the Chief Executive wrote Madison, "If it should be your own desire, I have not the smallest objection to your conversing freely with Colonel H - - on all matters respecting this business"—the "Colonel H" apparently being Alexander Hamilton and "this business" referring to conduct of the Presidential office.[3] A note written by Washington implies that Madison wrote the President's brief and modest first inaugural address.[4] Washington's correspondence shows that in the months that followed the President often called on his young Virginia friend for advice—on matters which would have been presented to the Senate if that body had been the informal advisory council previously anticipated.

Washington even made Madison a one-man council of advice in his dealings with the Senate itself. On at least one occasion Madison wrote the brief response which the President addressed to the Senators as they stood in his drawing room after presenting their formal reply to the President's annual address. In August 1789, in addition to advice about patronage (a special Senate prerogative), Washington sought Madison's opinion as to whether or not he should obtain the sense of the Senate on the propriety of sending envoys abroad and on designation of a day for Thanksgiving, and whether or not he should veto a congressional salary bill which did not give Senators more pay than House Members.[5]

A most significant illustration of the President's reliance on Madison at the expense of the Senate was the Chief Executive's request for Madison's advice on the method of presenting nominations to the Senate. Washington subsequently held a personal conference with Madison on the subject. Irving Brant stated that the detailed analysis of the constitutional relations between President and Senate which Washington thereupon gave to the Senators bore in each sentence the stamp of "Madison's thought and style."[6]

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[2] Irving Brant, *James Madison: Father of the Constitution* (Indianapolis: Bobbs-Merrill Co., 1950), p. 236.

[3] Letter, Washington to Madison, Feb. 24, 1789, Fitzpatrick, *op. cit.*, XXX, 176 fn.; Washington to Madison, Mar. 30, 1789, *ibid.*, XXX, 255.

[4] Washington to Madison, May 5, 1789, *ibid.*, XXX, 310.

[5] Washington to Madison, Jan. 10, 1790, *ibid.*, XXX, 499; Washington to Madison, August (no day) 1789, *ibid.*, XXX, 393–394.

Washington's reliance on Alexander Hamilton for advice regarding the conduct of the Presidency is too well known to require detailing here. At the beginning, the first President sought advice rather indiscriminately from men in whom he had confidence—Madison, Hamilton, and to a lesser extent Jefferson, Knox, and others. In 1789 Hamilton and Madison were fresh from their recent collaboration in the struggle for the Constitution and were prepared to work together in preparing recommendations for the President's use. As partisanship developed concurrently with Hamilton's financial program, the President was forced to seek advice from these men individually and then choose the recommendation which he believed had most merit. Usually, but not always, Washington chose to follow Hamilton's recommendations.

As Madison became more and more dissatisfied with the administration's program, the Virginia Congressman's relations with the President became less cordial and his advice less frequently sought. Although Hamilton followed Jefferson out of the Government in 1795, Washington continued to look to him for advice and assistance. By the time Washington could finally look forward to retirement to Mount Vernon, it was from Hamilton that he sought help in writing his Farewell Address. Madison had become one of "the characters who are now strongest, and foremost in the opposition to the Government * * *."[7]

The point that should be stressed here is that while Washington and others had previously anticipated that the Senate's advisory role would go beyond the technical "advice and consent" demanded by the Constitution in the two important fields of appointments and treaties and would develop into an informal, intimate, and day-by-day advisory relationship, the first President discovered almost immediately that he preferred to seek his informal advice elsewhere. One of the roles envisaged for the Senate by the men of 1787 thus never materialized.

FEDERAL APPOINTMENTS UNDER WASHINGTON

Because of its importance to the development of an honest and efficient Federal administrative system, the subject of appointments to Federal office has been carefully studied by political scientists. There is, therefore, little need here to go into a detailed discussion of the exercise of the appointing and confirming powers during the period under study. However, some aspects of the relation between the President and the Senate in the field of appointments need to be emphasized to show the extent to which the plans of the constitutional fathers were realized with respect to the Senate as an "advisory council to the President" in this sphere.[8]

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[6] Brant, *op. cit.*, pp. 282–283. Brant stretches to the utmost the President's reliance on Madison.

[7] Washington to Hamilton, May 15, 1796, Fitzpatrick, *op. cit.*, XXX, 48–51.

[8] For detailed studies of Presidential appointments during this period see: Harris, *op. cit.*, pp. 36–52; Hart, *op. cit.*, pp. 111–126; White, *op. cit.*, pp. 21–25, 32–87; Gaillard Hunt, "Office-Seeking during Washington's Administration," *American Historical Review*, I (January 1896), 270–283, and "Office-Seeking during the Administration of John

President Washington submitted his first nomination, that of William Short to take charge of American affairs in France in the absence of Jefferson, in writing. He submitted the nomination on June 15, 1789, with the statement that Secretary of Foreign Affairs John Jay had been directed to lay before the Senate at its convenience papers describing Short's qualifications. Secretary Jay, complying with the Senate's request, submitted these papers the following day, and Short was promptly confirmed.[9]

Many Senators, however, were dissatisfied with this arm's-length method of receiving nominations and giving their advice and consent. They wanted the President to submit his nominations in person as being more in harmony with their ideas of the proper relationship between a President and his advisory council. Washington meanwhile, on August 3, 1789, submitted in writing the names of 102 nominees for the positions of collector, naval officer, and surveyor at various ports. The Senate confirmed almost all of these in a matter of 2 or 3 days (confirmation of a few was delayed for technical reasons), but rejected Benjamin Fishbourn as naval officer at Savannah, Ga. Experience with these nominations resulted in the introduction on August 5—the same day that Fishbourn was rejected—of a motion to the effect that it was "the opinion of the Senate, that their advice and consent to the appointment of officers should be given in the presence of the President." [10]

Rather than act unilaterally on this motion, the Senate the following day appointed a committee, consisting of Senators Izard, King, and Carroll, to meet with the President and learn directly from him the method of communication with respect to treaties and appointments which he wished to adopt as a permanent policy. The next day—before the committee had had a chance to meet with the President—the Senate received from him a dignified message politely reproaching the Chamber for rejecting a highly qualified nominee and suggesting that when a nominee appears questionable, the Senate ought to inform the President and avail itself of the information which led him to make the choice.[11]

With these current developments in mind, the committee on August 8 met with the President to discuss methods of communication between President and Senate. The committee very courteously informed the President that its only object in coming was to be informed of the method that would be most agreeable to him and that the Senate would acquiesce in any procedure he would specify. However, Washington could discern that oral communications were what the Senators really wanted. In fact, one of the Senators told him that he wished the President to submit nominations in person because he believed this would help to effect *viva voce* (oral) voting on nominations in the Senate (rather than by secret ballot), an object this Senator greatly desired but which he admitted could possibly be obtained without oral communications.[12]

Adams," *ibid.*, II (January 1897), 241–261; Carl Russell Fish, *The Civil Service and the Patronage* ("Harvard Historical Studies," vol. XI [Cambridge: Harvard University Press, 1904]), pp. 1–28; Lucy Salmon, *History of the Appointing Power of the President* ("Papers of the American Historical Association," vol. I, No. 5 [New York: G. P. Putnam's Sons, 1886]).

[9] *Senate Executive Journal*, 1st Cong., 1st sess., June 16, 17, and 13, 1789, pp. 6–7.

[10] *Ibid.*, Aug. 3 to 5, 1789, pp. 9–16.

[11] *Ibid.*, Aug. 7, 1789, pp. 16–17.

[12] Letter, Washington to Madison, Aug. 9, 1789, Fitzpatrick, *op. cit.*, XXX, 374–375.

President Washington informed the committee that he favored oral communications in all matters respecting treaties (an opinion which experience caused him to reverse, as will be mentioned in more detail below) and the propriety of sending representatives to foreign courts. But with respect to nominations, he definitely favored written messages. His reasons for this opinion, as given to the committee, were clear and to the point: (1) A nomination concerned a single object unconnected in its nature with any other object and thus lent itself easily to written communication; (2) written messages would place the acts of both President and Senate upon "clear, distinct, and responsible ground" and (3) the presence of the Chief Executive in the Senate Chamber while his nominations were discussed would be awkward for both President and Senate. He elaborated on this last point by stating that the presence of the Chief Executive might restrain the Senators from full and free inquiry into the character of the nominee, while the President would be reduced to being a silent witness to a ballot or to being a defense counsel for his candidate in the event there was objection to his appointment—all of which would be improper, "for as the President has a right to nominate without assigning his reasons, so has the Senate a right to dissent without giving theirs." [13]

The following day Washington took the rather extraordinary step of writing Madison, a Member of the lower House, describing his conference with the Senate committee and asking his advice.[14] Madison's reply is not included among his published letters, but it may be significant that at a second conference with the Senate committee on August 10, the President adopted a somewhat different approach. In this second conference, the President emphasized that when the Senate exercises its powers over treaties and appointments, it is "evidently a Council only to the President, however its concurrence may be to his Acts," and, therefore, the time, place, and manner of consultation should be decided by the President. Since circumstances and needs might vary, he suggested that the Senate accommodate its rules to such anticipated uncertainty by providing for reception of either oral or written communications from the President and for giving its advice and consent in either the presence or absence of the President. He anticipated that when the Government acquired buildings of its own, the President would have an Executive Chamber to which he could summon the Senate. With respect to appointments, the Senators might be summoned to the President's residence, since the agency of the Senate would be purely executive. Since a treaty, on the other hand, could be considered as much a legislative as an executive matter, the deliberations might well be held in the Senate Chamber. However, when a chamber was provided for the joint business of the President and Senate, the distinction between executive and legislative meetings between the President and Senate would be lessened, if not eliminated.[15]

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[13] Memorandum entitled "Sentiments Expressed to the Senate Committee on the Mode of Communication Between the President and the Senate on Treaties and Nominations," dated Aug. 8, 1789, *ibid.*, XXX, 373–374.

[14] Letter, Washington to Madison, Aug. 9, 1789, *ibid.*, XXX, 374–375.

[15] Memorandum entitled "Sentiments Expressed to the Senate Committee at a Second Conference on the Mode of Communication Between the President and the Senate on Treaties and Nominations," dated Aug. 10, 1789, *ibid.*, XXX, 377–379.

In a resolution adopted August 21, 1789, the Senate, following the report of the committee which had discussed the matter with the President, accommodated itself perfectly to the President's wishes by adopting a resolution providing for receptions of written nominations, for receptions of the President in the Senate Chamber, and for attending the President at any other place he might designate. In the same resolution the Senate provided for *viva voce* votes.

Ignoring this provision for possible submission of nominations in person, President Washington continued his practice of communicating nominations by written message. This practice has been followed by all his successors.[16]

Washington, after an original intention to the contrary, followed this same policy with respect to fixing the places to which diplomatic and consular officials should be sent, and with respect to the grade of diplomats. After the question of consulting with the Senate on these matters was raised, he discussed it with Madison, Jay, and Jefferson. All three agreed that the Senate had no constitutional right to interfere in fixing either place or rank, its powers extending no further than a simple approval or disapproval of persons nominated by the President.[17]

The Senate was not immediately convinced that this ought to be its only role in such matters. In December 1791, after Washington had nominated Ministers to represent the United States at Paris, London, and The Hague, the Senators utilized the opportunity to debate the proposition that the Chamber did not possess evidence to convince its Members that it would be in the interest of the United States to appoint Ministers Plenipotentiary to reside permanently at foreign capitals. After weeks of delay and only upon being convinced of the special need for representation at these three capitals did the Senate, by a narrow vote, approve the President's nominations.[18]

At first there was considerable controversy as to whether votes on confirmations should be by secret ballot or *viva voce*. Maclay vehemently supported the secret ballot on the ground that it would prevent administration pressure on the Senators, who would be sure to lose their place in the Presidential "sunshine" if they voted against the Chief Executive's nominees. To Senator Carroll's argument that secret ballots produced cabals and bargaining for votes, Maclay answered that secret ballots would prevent such cabals since men made bargains for certainties. Ellsworth, among others, opposed secret ballots on the ground that though they suited bashful men, they were the worst method for "bad and unprincipled men." In spite of strong opposition, including that of Vice President Adams, the Senate decided 11 to 7 to vote by ballot on the confirmation of Washington's first nominee, William Short as American representative at the French court.[19]

This decision by the Senate aroused some outside criticism. Representative William Smith wrote to a friend that secret ballots would enable Senators to "skulk concealed" rather than act in an open and aboveboard manner. He anticipated that such secret manipulations would throw appointment of Federal officials entirely into the hands of the Senators.[20]

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[16] Haynes stated in 1938 that there had been only one exception to this rule. In 1921, President Harding (for 6 years a Senator) went from his inauguration ceremony directly to the Senate Chamber to submit nominations for his Cabinet, including the names of two Senators. Haynes, *Senate of the U.S.*, II. 724.

[17] Entry dated Apr. 27, 1790, John C. Fitzpatrick (ed.), *Diaries of George Washington* (Boston: Houghton Mifflin Co., 1925), IV, 122.

[18] *Senate Executive Journal*, 2d Cong., 1st sess., Dec. 22, 1791, p. 92; Dec. 30, 1791, p. 93; Jan. 6, 1792, pp. 93–94; Jan. 12, 1792, pp. 96–97; Jan. 16, 1792, pp. 97–98.

[19] Maclay, *op. cit.*, pp. 77–78.

When the Senate on August 3, 1789, received the President's first long list of nominations, the question came up again. At this time the Senate refused to reconsider its previous decision to vote by secret ballot. However, a caveat was assented to that use of that method would not be considered a precedent. A few days later, when the Senate's committee discussed the subject with Washington, the President declared his own preference for the *viva voce* method, stating that nothing would sooner induce him to relinquish nominations by written message than to accomplish this end. Two weeks later when the committee reported and the Senate adopted its rules concerning communications with the President, the Chamber reversed itself and included a clause providing for *viva voce* votes on nominations. That has been the method ever since whenever votes have been necessary, although until 1929 appointments were considered in closed executive sessions and the votes not made public. At first the Senate considered and voted on each name individually, but soon, seeing the great amount of time needlessly consumed in this fashion, adopted the practice of often confirming long lists of nominations en masse.[21]

WASHINGTON AND "SENATORIAL COURTESY"

In view of the later development of the individual Senator's power to initiate appointments—the system now known as "senatorial courtesy"—it is natural to ask what part Senators played during this early period in presenting candidates for Federal offices.

Such a question cannot be answered summarily since the individual Senator's share in recommendations to office did not present a clear or consistent picture. Applications for Federal appointments took a great many forms and recommendations were sought and obtained from many different classes of officials. Men coveting Federal office sought the help of anyone they thought exercised the necessary influence, and thus the published correspondence of nearly all the public figures of that day contain references to requests for help in obtaining Federal appointments. Although actual applications were usually sent to the President or the head of the executive department concerned, appeals for supporting recommendations were sent to influential private citizens, State leaders, Federal officials, and—especially—Members of Congress.

As might be expected, Senators received their full share of such appeals, which, of course, were most frequent at the time the new Government was inaugurated and there was a host of newly created Federal posts to fill. In the very beginning, some applications for appointment were submitted to the President and Senate jointly, in the belief that they shared the appointing power. Some applicants sought the help of several Senators in efforts to crash the ramparts of Presidential hesitation. Gen. Otho Holland Williams, for instance, who in 1789 sought the post of collector for the port of Baltimore which he currently held under the State of Maryland, sought the help of Senators Richard Henry Lee, of Virginia; Robert Morris, of Pennsylvania; James Gunn, of Georgia; and John Henry, of Maryland. He obtained the appointment.[22]

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[20] Letter, Smith to Otho Holland Williams, June 19, 1789, *Otho Holland Williams Papers*, pp. 173–174.

[21] *Senate Executive Journal*, 1st Cong., 1st and 2d sess., *passim*.

Sometimes in response to such appeals, at other times on their own volition to help their friends, Senators submitted to the President or his department heads the names of numerous individuals whom they favored for Federal offices. Some Senators saw no impropriety in making such recommendations and did not hesitate to do so; others, like Senator George Cabot, of Massachusetts, opposed in principle any attempt by the Senate to take the initiative regarding appointments, and submitted names with a certain amount of diffidence.[23]

Senatorial recommendations were often helpful in securing appointments. Senator George Read was apparently instrumental in obtaining for Joseph Anderson the post of U.S. judge for the territory south of the Ohio. Senator Ralph Izard was helpful in securing for Timothy Pickering the office of Postmaster General. This appointment was also pleasing to Senator Paine Wingate, Pickering's brother-in-law, who had worked long and vigorously for his appointment to an attractive Federal post. Senator George Cabot successfully recommended Christopher Gore as commissioner to London under the Jay Treaty. Gore was also a close personal friend of Senator Rufus King.[24]

On the other hand, Senators were by no means always successful in obtaining places for the individuals they recommended. Senator Maclay tried hard to advance the interest of his brother-in-law Davy Harris, even making a special visit to Colonel Humphreys of Washington's staff to recommend his appointment to the customs service at Baltimore. But Harris was not appointed—a circumstance the bilious Pennsylvania Senator blamed on his failure to "play court" to the President. In 1794, Washington refused to appoint Senator Aaron Burr as successor to Gouverneur Morris as minister to the French Republic even though his appointment was strongly and repeatedly urged by "the democratic members of the Senate [including Monroe] and some of the most distinguished members of the House." [25]

In 1790, Washington wrote Secretary of the Treasury Hamilton as follows regarding the office of commissioner of loans for New Hampshire:

> I have no objection to Mr. Keith Spence, the person recommended by Mr. John Langdon [Senator from New Hampshire], provided that, on enquiry, you find him to be the person best qualified to discharge the duties of the Office.

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[22] Letter, Williams to Henry Lee, Jr., Jan. 3, 1789; Williams to Robert Morris, Jan. 3, 1789; Williams to James Gunn, Mar. 4, 1789; Williams to John Henry, Mar. 5, 1789, *Otho Holland Williams Papers*, pp. 160–164.

[23] Letter, Cabot to Washington, Mar. 4, 1796; Cabot to Pickering, Sept. 23, 1799, Henry Cabot Lodge (ed.), *Life and Letters of George Cabot* (Boston: Little, Brown & Co., 1878), pp. 94, 240–241.

[24] Letter, Cabot to Washington, Mar. 4, 1796, *ibid.*, p. 94; Read, *op. cit.*, pp. 533–534; Wingate, *op. cit.*, II, *passim.*; Anne Izard Deas, *Correspondence of Mr. Ralph Izard of North Carolina* (New York: Charles S. Francis & Co., 1844), p. XII.

Senator Robert Morris recommended Hamilton for the post of Secretary of the Treasury, but in this case Morris' influence was no doubt due less to his position as Senator than to his prominence in financial matters. Washington himself, of course, was well acquainted with Hamilton's ability.

[25] Maclay, *op. ct.*, pp. 89–90, 128; Matthew Livingston Davis (ed.), *Memoirs of Aaron Burr* (New York: Harper & Bros., 1837), I, 408–409. Washington had indicated a willingness to appoint a Republican to the post, but refused to name Burr because of lack of confidence in his integrity. Davis, whose work was based on Burr's private papers, stated the above information came from Burr and from "the written statement of a gentleman of high standing, to whom Mr. Monroe repeated all the details" (p. 409). Although this Republican caucus refused to recommend anyone else, Monroe was subsequently appointed.

> Mr. Lear's knowledge of the characters in the State of New Hampshire will assist your information on this subject.[26]

This would seem to indicate that Washington attached only a moderate amount of weight to the recommendation of even a very conspicuous Senator.

Recommendations by members of the House of Representatives seemed to carry approximately the same weight with Washington as did those of Members of the upper House. In a letter of advice to his son-in-law regarding how to obtain a Federal appointment, Roger Sherman recommended letters of reference from "Members of Congress." A study of applications of Virginians for Federal office during Washington's administration showed that recommendations by members of the House were especially frequent and prominent, although the applicants also obtained recommendations from Senators and anyone else whom they believed might have influence in the Government. During the early part of Washington's administration, Representative James Madison was an especially close adviser to the President in filling offices. For instance, in a confidential letter dated August 1789, the President asked Madison for his opinion of several individuals who had applied for Federal judgeships, and also requested the Virginia Representative to submit names himself of men whom he considered qualified.[27]

Maclay recorded that Izard informed him that during the conference with Washington regarding methods of communication between the President and Senate, Washington defended consultation with Members of the House regarding appointments to the exclusion of Senators on the basis that the latter "could have opportunity of giving their advice and consent afterwards."[28] This is a difficult statement to understand in view of Washington's policy of submitting names to the Senate in writing, giving the Senators opportunity to accept or reject nominees only. Perhaps he was at that time still considering the possibility of meeting with the Senate in person to discuss appointments.

Recommendations by an entire congressional delegation—that is, by all the Members of the Senate and House from a given state—were given great weight, especially since Washington made a special effort to see that every section of the country was represented in the executive and judicial branches of the new Government. A good example is the case of Oliver Wolcott, Jr., of Connecticut, who in 1789 was appointed auditor of the Treasury, the third highest post in the Department. All the members of the Connecticut delegation, quite aware that their State had not yet been honored by a high appointment in either the executive or the judicial branch, joined in recommending Wolcott, and their expectations were not disappointed.[29]

Washington directed his department heads to investigate the qualifications of candidates and to consult with State delegations in both

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[26] Letter, Washington to Hamilton, Oct. 26, 1790, Fitzpatrick, *Writings of Washington*, XXXI, 135. Lear, a native of New Hampshire, was the President's secretary.

[27] Letter, Roger Sherman to Simeon Baldwin, July (no day) 1789, cited in Boardman, *op. cit.*, p. 309; John W. Herndon, "Application of Virginians for Office During the Presidency of George Washington, 1789–1797," *William & Mary College Quarterly*, XXIII, 2d series (April 1943), pp. 162–205: Washington to Madison, August (no day) 1789, Fitzpatrick, *Writings of Washington*, XXX, 393–394.

[28] Maclay, *op. cit.*, p. 122.

[29] Letter, Representative Jeremiah Wadsworth to Oliver Wolcott, Jr., Aug. 12, 1789, Gibbs, *op. cit.*, I, 19, and *passim*.

Senate and House about appointments. He also went out of his way to search out capable men who might be induced to serve the Government but who had not applied nor yet been recommended by anyone. After the first few months of his administration, he turned to Hamilton more frequently than to any other individual—partly because more than half the openings were in Hamilton's Department, partly because of his confidence in Hamilton's judgment and prudence.[30]

Returning to the role of Senators in recommending applicants for appointment, it should be pointed out that although candidates sought help from anyone—inside or outside their own States—whom they believed to have enough influence to be helpful, the applicant was normally expected first to obtain the approval of Senators and House Members from his own State, although their active intercession was not necessarily expected.[31] This arrangement might seem to be but a few short steps from that aspect of the modern system known as "senatorial courtesy," which provides that nominations from a given state are not confirmed unless first approved by the Senators of the President's party from that State. Two incidents may seem to suggest that the embryo of the system of "senatorial courtesy" was already taking shape in this early period.

In February 1790, President Washington wrote in his diary that he had received from Representative Williamson of North Carolina a list of names of individuals recommended for revenue offices in his State, and that he had submitted this list to the Senators from North Carolina for their "inspection and alteration." [32] This would seem to indicate that Washington would decline to appoint Federal revenue officials in a State without the prior approval of the Senators from that State. However, this does not represent the true picture. This one occasion was apparently the only recorded instance in which Washington followed this procedure. The reason for its use in this case is fairly evident. Since antifederalism (in the sense of opposition to adoption of the Constitution) was extremely strong in North Carolina—strong enough to defeat the Constitution at the State's first ratifying convention—Washington realized that Federal appointments in that State must be made with most extreme care so that the interest of the Union might not be jeopardized by inappropriate appointments. It is quite likely, therefore, that he submitted Representative Williamson's list to Senators Benjamin Hawkins and Samuel Johnston in order merely to avail himself of the good advice of these prominent and loyal friends of the Constitution. Another plausible explanation of Washington's action in this case is that the President was aware that he had been criticized for paying too much attention to the recommendations of House Members at the expense of the Senate and wished to allay such criticism.[33]

The other instance was the famous Fishbourn case, in which the Senate aroused the anger of President Washington by its rejection of a well-qualified nominee for the post of naval officer of the port of Savannah, Ga., for no other reason (so the story goes) than that the Georgia Senators preferred another candidate. Such action would be in perfect harmony with the modern system of "senatorial courtesy." However, James Hart in his detailed and painstaking study of *The American Presidency in Action, 1789*, stated that none of several eminent authorities who cited the Fishbourn case as the first example of "senatorial courtesy" substantiated the claim with contemporaneous evidence, only Haynes citing any authority at all. Haynes cited only Thomas Hart Benton's *Abridgment of the Debates of Congress*, which in a footnote referred to this case as—

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[30] Letter, Washington to Jay, Dec. 21, 1795, Fitzpatrick, *Writings of Washington*, XXXIV, 397; Harris, *op. cit.*, p. 37.

[31] For examples, see Wingate to Pickering, n.d., 1789, Wingate, *op. cit.*, II, 291; Tench Coxe of the Treasury Department to John Steele, Nov. 19, 1793, Wagstaff, *op. cit.*, I, 101–102.

[32] Entry dated Feb. 5, 1790, Fitzpatrick, *Diaries of Washington*, IV, 85.

[33] Haynes, *Senate of the United States*, II, 725.

> a strong instance of the deference of the Senate to the Senators of the State interested in the nomination, Col. Fishborn having been rejected simply because the Georgia Senators preferred another.[34]

Benton, who was only 7 years old at the time the event took place, was not a contemporary authority, but because of his close subsequent relations with some of the leaders of the earlier period was, as Hart stated, "in a position to pick up a traditional story of the reasons for the rejection which may well have been true." Fishbourn himself apparently believed that some charges of which Washington was unaware had been brought against him in the Senate. If Fishbourn was correct in his belief, this could not be considered a clear case of "senatorial courtesy." Hart concluded that the evidence concerning the reasons for the Senate's rejection of Fishbourn's nomination is not definitive.[35]

At any rate, even if this were a case in which the principle of "senatorial courtesy" was adhered to, it still did not constitute a precedent which the Senators of that period followed. Of the hundreds of nominations sent to the Senate during Washington's administration, this was the only case in which rejection for such a reason has been suggested—in spite of the fact that Senators then, as they do now, had every opportunity to object to nominations with which they did not concur. Maclay stated in 1790 that after he and Senator Izard objected to giving their consent to appointments of men about whom they knew nothing, Senators rose and gave information concerning appointees from their States, after which all of them were confirmed. This was apparently becoming an accepted practice. Several months previously one of the New Hampshire Senators, although impressed by the favorable testimony of Senator Butler of South Carolina concerning the merits of James Iredell, of North Carolina, whose nomination as Associate Justice of the Supreme Court was before the Senate, insisted on hearing from the Senators from Iredell's own State. Only after Senator Hawkins of North Carolina had corroborated Butler's testimony was Iredell confirmed.[36]

This procedure, although utilizing one of the methods of modern "senatorial courtesy," differed from the modern practice in two important respects. In the first place, the fact that a Senator from the nominee's home State stood up and supported his confirmation did not necessarily mean that that Senator had originally sponsored his nomination—or, for that matter, was personally acquainted with him at all. For instance, in a letter to his colleague, John Langdon, Senator Paine Wingate, of New Hampshire, in 1789 listed the names of men nominated by Washington for Federal district judgeships in their own State without any indication (here or elsewhere in his correspondence) that either of the Senators had been consulted about these nominations. Yet all three were readily confirmed by the Senate.[37]

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[34] Thomas Hart Benton, *Abridgment of the Debates of Congress, From 1789 to 1856* (New York : D. Appleton & Co., 1857–63), I, 17 fn. ; Haynes, *Senate of the United States*, II, 736–737.

[35] Letter, William Jackson (on behalf of Washington) to Benjamin Fishbourn, Sept. 25, 1789, Fitzpatrick, *Writings of Washington*, XXX, 412 ; Hart, *op. cit.*, pp. 123–125.

[36] Maclay, *op. cit.*, p. 274 ; Griffith J. McRee, *Life and Correspondence of James Iredell* (D. Appleton & Co., 1857, reprinted 1949), II, 278–280, citing letter Samuel Johnston to Iredell ; Harris, *op. cit.*, p. 40.

The second point is a natural corollary of the first: With the possible exception of Benjamin Fishbourn, the President's nominees were confirmed unless they were actually considered *unfit.* The mere fact that the Senators from a given State preferred another candidate or believed some other candidate better qualified than the individual nominated, was not considered sufficient reason for rejection. Only five of Washington's nominations were negatived.[38] Besides Fishbourn's, the only significant rejection was that of John Rutledge as Chief Justice of the Supreme Court in 1795. There is no doubt that the Senate's Federalist majority considered him "unfit," but there is considerable question whether that "unfitness" lay simply in his open denunciation of the Jay Treaty or in mental derangement, "sottish" habits, or improper conduct in pecuniary transactions. Hamilton wrote his friend Senator Rufus King that although he was willing to forget Rutledge's outburst against the Jay Treaty, the nominee's confirmation should be defeated on the latter grounds—but only if they were substantiated by "persons of character" who were acquainted with the facts. Jefferson, on the other hand, claimed that the Federalists could not even have pretended to have any objection to Rutledge aside from his opposition to the Jay Treaty, and that his rejection was a declaration that the Senate's Federalist majority would confirm only "tories" thereafter.[39]

The decisive reason for the rejection is not clear, but there can be little question that the Federalist Senators were predisposed to disfavor Rutledge because of his opposition to the Jay Treaty, for the ratification of which they were being subjected to such venomous abuse. Yet in their own minds they no doubt considered that their rejection was based on the alleged unfitness of the nominee.[40]

The evidence thus indicates that during Washington's administration the Senate as a whole shared in principle the forcefully expressed view of Senator George Cabot that—

> * * * the power of the Senate was in no sense *initiative or even active,* but *negative* and *censorial,* and was never to be exercised but in cases where the *persons* proposed for office were *unfit.* I have always rejected the idea of nonconcurrence with a nomination merely because the nominee was less suitable for the office than thousands of others: he must be positively *unfit* for the office, and the public duty not likely to be performed by him * * *.[41]

Such a stand by the Senate was furthered by President Washington's character and prestige, as well as by the quality of his appointments. The first President was not the type of person to be coerced—

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[37] Letter, Wingate to Langdon, Sept. 24, 1789, Wingate, *op. cit.*, II, 337.

[38] Clara Hannah Kerr, *Origin and Development of the United States Senate* (Ithaca, N.Y.: Andrus & Church, 1895), p. 110.

[39] Letter, Hamilton to King, Dec. 14, 1795, Henry Cabot Lodge (ed.), *Works of Alexander Hamilton* (Constitutional ed; New York: G. P. Putnam's Sons, 1904), X, 135–136; Jefferson to William B. Giles, Dec. 31, 1795, Lipscomb, *op. cit.*, IX, 318.

[40] For a discussion of this incident see John Harold Wolfe, *Jeffersonian Democracy in South Carolina*, vol. 24, No. 1 ("James Sprunt Studies in History and Political Science" [Chapel Hill, N.C.: University of North Carolina Press, 1940]), pp. 90–92.

[41] Letter, Cabot to Pickering, Sept. 23, 1799, Lodge, *Letters of George Cabot*, pp. 240–241. The italics are Cabot's. Although written in 1799, this letter referred to opinions Cabot held while a Senator, 1791–96.

as Senator Monroe and his Republican associates discovered when they tried to force on him the nomination of Aaron Burr as Minister to France. On another occasion during that same year (1794), when Monroe tried to influence the President against nominating Hamilton as special envoy to Great Britain (the post subsequently given to Jay), Washington bluntly replied that the responsibility for nominations was the President's alone.[42] Added to a dignity of demeanor that would allow no trifling, Washington had a high concept of the office of President that impelled him to do all he could to maintain what he considered its constitutional prerogatives. Moreover, Washington was fortunate in enjoying a commanding position in the hearts of his countrymen, a prestige that enabled him to exercise considerable independence in his dealings with Congress. In addition, the general level of his nominations was so high that the Senate would have put itself in a disadvantageous position before the country if it had rejected many of them. Finally, the first President had the political astuteness to make it a definite policy not to nominate men to whom strong opposition could be expected.[43]

On the whole, exercise of the appointing and confirming powers during Washington's two terms deemphasized the Senate's role as an "advisory council" in the sense of a consultative body, and stressed the separate natures of the nominating and confirming aspects. Carl Russell Fish's statement that "the influence of the senators was simply that of men with special opportunities for information" oversimplifies the situation somewhat since Washington was fully aware that his nominations would have to meet the test of Senate confirmation, but the first President did establish the precedent that the Chief Executive alone is responsible for initiation of appointments.[44]

The Power of Removal—To Share or Not to Share

In addition to these developments concerning exercise of the appointing power, Congress during Washington's administration established a strong precedent with respect to location of the power to remove executive officials.

This subject—with its ramifications in the field of constitutional interpretation and administrative policy—is too wide and complex to be adequately covered here. The historical aspects, including developments during the period under study—especially the decision of Congress in 1789—have been discussed in detail by a large number of experts in the field of constitutional development, including the membership of the United States Supreme Court.[45]

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[42] Washington to Monroe, Apr. 9, 1794, Fitzpatrick, *Writings of Washington*, XXXIII, 320–321.

[43] The qualifications which Washington sought in his nominees are beyond the scope of this study. They are discussed at some length in Gaillard Hunt's article, "Office-Seeking during Washington's Administration," mentioned earlier in this chapter.

[44] Letter, Jefferson to Monroe, Apr. 11, 1792, Paul Leicester Ford (ed.), *Writings of Thomas Jefferson* (New York: G. P. Putnam's Sons, 1892–99), V, 503.

[45] See, especially, *Myers v. United States* (1926). The precedents set in the years under study were discussed in the majority opinion read by Chief Justice Taft, in the dissenting opinions of Associate Justices Holmes, McReynolds, and Brandeis, by Senator George W. Pepper as *amicus curiae*, and in the arguments and briefs of Solicitor General James M. Beck and Special Assistant Attorney General Robert P. Reeder; see *Cases Adjudged in the Supreme Court at the October Term, 1926, United States Reports*, vol. 272 (Washington, D.C.: Government Printing Office, 1927), pp. 52–295.

Edward S. Corwin took strong exception to the majority opinion in a monograph which also discussed in detail the 1789 congressional debate; see *The President's Removal Power under the Constitution* (New York: National Municipal League, 1927). See also Hart, *op. cit.*, pp. 155–214, 239–248, and *passim*.

It is, therefore, necessary here merely to summarize the principal aspects of the 1789 controversy and its outcome and to emphasize their significance in the history of the Senate.

The question of where to locate the power to remove officials appointed by the President and confirmed by the Senate became a critical one when the bills to establish the Departments of the Treasury and of Foreign Affairs came before the House and Senate. It was clear that the Constitution gave to the President the power to nominate, and with the advice and consent of the Senate to appoint, the officers of these Departments, but it did not say whether or not the advice and consent of the Senate was necessary to remove them. The controversy thus raged around conclusions drawn by implication from the Constitution and around conflicting viewpoints on the practical requirements of good government.[46]

Their were four main schools of thought on the subject:

The first group claimed that removals could be made by impeachment only, since that was the only method mentioned in the Constitution. This group had as its champions Smith of South Carolina in the House and Maclay of Pennsylvania in the Senate. Their opinion was too extreme to attract much support.

The second group believed that removals as well as appointments were subject to confirmation by the Senate. Its members claimed that in the very nature of things the power which appointed should also remove. Since appointments were not complete without Senate approval, neither were removals.[47] "It is a maxim in legislation as well as reason, and applies well in the present case, that it requires the same power to repeal as to enact," said Maclay (who seemed to see no inconsistency between removals by impeachment only and removals by the President with the consent of the Senate—or perhaps he changed his mind).

The third group claimed that the Constitution gave the power to remove to the President only. The Constitution, said these members, gave the President the "Executive power" (not "powers") and thus authorized him to perform all executive acts unless the Constitution expressly stated otherwise, as in the cases of treaty ratification and appointments to office. Such exceptions must be interpreted strictly.

The fourth group noted that the Constitution was silent on the subject of removals, and thus claimed that Congress could use its own judgment as to where to place the removing power. They cited the constitutional provision giving Congress power to establish executive offices as giving the legislative branch authority also "to fix the tenure, and declare the control." Most members of this group opposed Senate interference in removals and, therefore, joined forces with the third, causing considerable blurring of constitutional and pragmatic arguments.

Practical arguments against giving to the President alone the power to remove were based chiefly on the fear of a strong Executive which had been so evident during the time the Constitution was under discussion. Undivided power of removal would make the President a monarch, was the claim, and although Washington could be trusted, future Presidents could abuse the power and jeopardize the people's liberty. The concept of the Senate as the special defender of State sovereignty was also used in support of this position in both House and Senate.[48] The Senate is the bulwark of the State governments against despotic presidential power, said Page of Virginia; minimize its power and the interests of the States would be endangered. He went further and stated that the Constitution clearly gave the Senate a share in the execution as well as the framing of laws—in other words, made the Senate a true executive council.[49]

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[46] The House debate on the issue is found in *Annals*, 1st Cong., 1st sess., May 19, 1789, pp. 387–399; June 16 to 23, 1789, pp. 473–608. Adams' notes on the subject are in Adams, *op. cit.*, III, 407–412. For Maclay's discussion, see Maclay, *op. cit.*, pp. 110–117.

[47] Maclay, *op. cit.*, pp. 110–111 and *passim*.

Arguments in favor of removals by the President alone, rested principally on the belief that there could be little responsibility, energy, or unity in the executive branch if the President did not have complete liberty to remove executive officials who proved to be unfit or failed to conform to his directives. If officials could not be dismissed without consent of the Senate, there would be grave danger that Federal officials with friends in the Senate would conduct their affairs with an eye to the Senate rather than the President, and in cabal with Senators undermine Presidential authority, promote discord and corruption, and establish a sort of aristocracy more powerful than the President. Such a close connection between executive officials and Senators would make the Senate an improper body to scrutinize the executive establishment and would undermine its objectivity as a court of impeachment. Moreover, the Senators were given a share in the appointing power because of their anticipated knowledge of the qualifications of candidates; they would have no such firsthand knowledge of causes for dismissal.

A large majority of the House Members favored reserving to the President alone the power of removal. They eliminated from the pending legislation an express grant of the removing power to the President alone because that would have implied that Congress had discretion to grant or withhold that power. They then recognized the right of the President to remove without Senate confirmation the officials referred to in the legislation by inserting a passing reference to the Chief Executive alone exercising that power. The House votes on these questions were 31 to 19 and 30 to 18.

Extensive reports of the Senate debates are not available since the upper House deliberated behind closed doors, but memorandums of the discussion by Vice President Adams and Senator Maclay indicate that the same lines of argument were used as in the House debates. The Senate's decision, however, involved one other important consideration—the *esprit de corps* of a body which was, of course, interested in the extent of its own powers. It is not surprising, therefore, that power of the Senate to share in removals received greater support in the upper than in the lower House. According to Maclay, the supporters of the opinion that the Senate must approve removals by the President were at first a majority in the Senate. This majority, the Pennsylvanian bitterly lamented, shrank away—not by force of open argument, but by the "cabals" of members "huddling away in small parties" on the Senate floor. Adams, he surmised, was the "great converter." [50]

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[48] Such support by southern Republicans of the Senate as the special defender of liberty and States' rights was in marked contrast to their attitude when the Senate ratified the Jay Treaty. See ch. IX, *infra*.

[49] *Annals*, 1st Cong., 1st sess., June 18, 1789, p. 540.

The vote in the Senate was 10 to 10. To break the tie, Adams was enabled to cast a vote for a principle in which he so fervently believed—responsibility in the hands of the Executive. This decision, made by the narrowest of votes, had the important immediate effect of avoiding a furious conflict with the House of Representatives, the results of which can only be conjectured. It is probable that Senate insistence on a share in the removal power would have resulted in a dangerous impasse between the two Houses. Representative William Smith claimed that the House would give up the bill establishing the Treasury Department rather than consent to Senate interference in this field.[51]

Of long-run significance was the decision's effect on the distribution of power between the executive and legislative branches. However, this 1789 decision was not an absolutely conclusive precedent for all future decisions on the subject. It directly involved only the officials referred to in the legislation then under consideration. The highly influential James Madison admitted that a distinction should be made between removals of purely executive officials like the Secretary of State and officers of a partially judicial character like the comptroller. [52] Nevertheless, the decision of 1789 was of the very first importance in fixing for the future the scope of the powers of the President and Senate. It established the principle of Presidential responsibility for the operations of the executive departments. It deemphasized again the Senate's role as a council to the President and separated further the spheres of activity of the Chief Executive and Senate. And—although the Senate vote was as close as could be—it was still a notable act of self-abnegation on the part of the Senate in the interest of an efficient and responsible government.

Federal Appointments Under President Adams

Upon his elevation to the Presidency, John Adams introduced no new principle affecting congressional participation in appointments to Federal offices, but in practice the influence of Members of Congress upon the selection of the appointees increased to a marked degree.

The reason is not hard to find. Adams did not enjoy the national prestige that gave Washington relative independence of action. Also, his lack of political finesse led to failure to obtain congressional recognition of his leadership in the patronage field as in other spheres of action.

In addition, the circumstances he faced were different and in some aspects more difficult. There appeared in Congress and elsewhere a reaction against the Executive leadership which Washington's prestige had made possible. Now party organization, backed by intense party feeling, had progressed to the point where a President had to be a party leader if he were to be a leader at all. Adams by principle declined to be a party leader. In practice he was partisan enough in his appointments to alienate the Republicans, but not partisan enough to satisfy the Federalists.[53]

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[50] This is another example of the dark suspicions concerning the motives of his colleagues which are so prevalent on the pages of Maclay's *Journal*. Maclay gave no evidence at all that any improper influence was used.

[51] Smith to Otho Holland Williams, Aug. 22, 1789, *Otho Holland Williams Papers*, p. 188. The probability of a Presidential veto must also be considered.

[52] *Annals*, 1st Cong., 1st sess., June 29, 1789, pp. 635–636.

Although Adams in general continued the policy of Washington in nominating only well-qualified men to office, he occasionally left himself open to criticism by the nature of his nominations. His repeated efforts to appoint his vain and ambitious son-in-law, Col. William S. Smith, to high military office, led on one occasion to a sharp rebuff by the Senate, where Timothy Pickering lobbied against him so successfully that Smith mustered only two votes. Adams, although his own opinion of Smith was not high, felt the "disgrace" keenly.[54]

On another occasion, Adams was obliged to withdraw his nominations to executive and judicial posts in the Mississippi Territory when a Senate committee inquiring into the nominees' qualifications considered them unfit. The nominee for Governor, George Mathews, was apparently rejected because as Governor of Georgia he had signed (albeit with honorable motive) the notorious Yazoo Land Act.[55]

Although Adams had far fewer nominations to make than Washington, eight of the second President's nominees were rejected and nine others lost by postponement to the end of the session, while only five of Washington's were rejected.[56]

In view of Adams' various difficulties, it is not surprising that Members of Congress reached out and grasped all the patronage "pie" they could at the President's expense. However, this did not lead to acceptance in principle of congressional initiation of appointments. In fact, there is evidence to show that some Members of Congress of both parties considered the procedure improper. The theory of Presidential initiative was thus retained; in actual practice the Senate was likely to refuse to confirm unless the nominee had previously been cleared by the congressional delegation from the nominee's home State.

A number of illustrations could be cited to show how the recommendation of the congressional delegation was the deciding factor in obtaining appointments during Adams' administration, but they are unnecessary in view of the fact that Adams himself explicitly admitted that that was the situation. When a relative of his requested appointment of a nephew to a Federal office, Adams replied:

> If I were to nominate him without previous recommendations from the senators and representatives from your State, the Senate would probably negative him * * * The Samuel Adams appointed a custom-house officer, was named by the senators and representatives of New Hampshire. I know him not.[57]

In making appointments, Adams was also confronted with the spectacle of a private citizen, Alexander Hamilton, and his own subordinates in the executive departments exercising more influence over members of the Senate's Federalist majority in the matter of appointments than he did:

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[53] For a more detailed consideration of executive leadership, see chs. XV and XVI, *infra*.

[54] Letter, Adams to Smith, Dec. 19, 1798, Adams, *op. cit.*, VIII, 617, 618. Smith also held administrative positions under Washington, by whom he was in 1798 suggested as adjutant general. Washington escaped criticism for sponsoring Smith, apparently because he was not a relative and later because Adams was ultimately responsible. See also White, *op. cit.*, pp. 278–280.

[55] Letter, Jefferson to Madison, May 3, 1796, Lipscomb, *op. cit.*, X, 36; *National Cyclopedia of American Biography*, I, 220 (Mathews); *Senate Executive Journal*, Apr. 18, 1798, pp. 269–270, May 2, 1798, p. 272.

[56] Kerr, *loc. cit.*

[57] Letter, Adams to Benjamin Adams, Apr. 22, 1799, Adams, *op. cit.*, VIII, 636.

> But I soon found myself shackled. The heads of departments were exclusive patriots. I could not name a man who was not devoted to Hamilton, without kindling a fire. The Senate was now decidedly federal * * *. And prosperity had its usual effects on federal minds. It made them confident and presumptuous. I soon found that if I had not the previous consent of the heads of departments, and the approbation of Mr. Hamilton, I run [*sic*] the utmost risk of a dead negative in the Senate.[58]

The most significant point here is that Adams was not politician or diplomat enough to be master in his own house or to inspire the Members of Congress of his own party to follow his leadership.

But by this time even the honored name of Washington was not enough to counteract the influence of the Federalist Members of Congress. As supreme commander of the military forces raised during the threat of war with France, the former President bitterly complained that the appointments be recommended after laborious investigation were set at naught whenever a Member of Congress "had a friend to serve or a prejudice to endulge." [59]

In view of the fact that obtaining Federal appointments through the influence of Members of Congress was the general rule during Adams' administration, it may occasion some surprise that Adams took such exceptional umbrage when a group of Senators called on him in 1799 to discuss the President's nomination of William Vans Murray as envoy to France.

"I was distressed," Adams wrote later, "because I thought the procedure unconstitutional." Even Senator Sedgwick, chairman of the Senate committee, admitted the procedure was an "infraction of correct principles." Adams finally agreed to the conference only on the understanding that it would be considered neither official nor a precedent.[60]

Adams probably took such extreme exception to this particular effort on the part of Senators to influence an appointment because the nomination of Murray as envoy to negotiate a treaty with France was not merely a question of patronage but one of high policy in a field—conduct of foreign relations—which was the peculiar domain of the President. However, it was a rebuff to Senate efforts to exert influence over appointments beyond that provided in the Constitution.

One illustration might help to show the interrelation between congressional influence and Presidential initiative in Adams' administration:

After passage of the Judiciary Act of 1801, the members of the delegations in the Senate and the House from Connecticut, Vermont, and New York met to recommend circuit judges for those States and agreed on three names to be submitted to the President. Adams, in the meantime, suggested for one of these posts the name of his former Secretary of the Treasury, Oliver Wolcott, and through the new Secretary, ex-Senator Samuel Dexter, approached Senator James Hillhouse, of Connecticut, to determine if he were acceptable to the Connecticut delegation.[61]

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[58] *Letters to the Boston Patriot*, XVII, included in *ibid.*, IX, 301.

[59] Letter, Washington to the Secretary of War, Mar. 25, 1799, Fitzpatrick, *Writings of Washington*, XXXVII, 160–161.

[60] *Letters to the Boston Patriot*, IV, Adams, *op. cit.*, IX, 248; Sedgwick to Hamilton, Feb. 25, 1799, Hamilton, *Works of Hamilton*, VI, 399.

[61] Adams was not aware that Wolcott had been one of the prime plotters against him while a member of the Cabinet.

This move took the Connecticut men somewhat off guard, since they were officially committed to Jonathan Sturges, while at the same time being very close, personally and politically, to Wolcott. Hillhouse carefully explained to Wolcott the reaction of the Connecticut delegation:

> I convened the delegation; we were of one sentiment—that having deliberately and formally recommended Mr. Sturgis [*sic*], a very honourable man, and one in every way qualified for the office, we could not with propriety do any thing to take back or impugn that recommendation; but as the President was not confined in his choice, nor bound to make a nomination in conformity to our recommendation, in justice to yourself, and from a respect to the chief magistrate, we felt ourselves bound to return an answer to the inquiry contained in Mr. D[exter]'s note, which the delegation unanimously authorized me to do, to this effect; that if it should be the pleasure of the President to nominate you to that office, it would be perfectly satisfactory to them, thinking you would be qualified for such appointment. This was not done, however, until the gentlemen from New York and Vermont had been consulted, who fully concurred therein.[62]

This incident is significant in that it shows (1) that the Connecticut, Vermont, and New York delegations took the initiative in suggesting names for the judgeships; (2) that Adams acted on his own initiative in suggesting Wolcott, but before nominating him consulted the congressional delegation from his State; (3) that the Connecticut delegation took it for granted that Wolcott would not be confirmed without its approval, but at the same time admitted that in theory, at least, the President was not bound to follow its recommendation, and (4) that although a Senator was the spokesman for the delegation, each member, Senator and Representative alike, had a voice in its deliberations on appointments—in other words, "congressional courtesy" was the rule rather than "senatorial courtesy." Wolcott was subsequently appointed and confirmed. He took special pleasure in the fact that his appointment was due to Adams' favorable opinion and in no degree to the Connecticut delegation's solicitation, expressing no awkwardness over receiving this favor at the hands of a President whom he had secretly opposed for several years.[63]

At about the same time, President-elect Thomas Jefferson and Republican Senator Charles Pinckney, of South Carolina, revealed their party's current attitude toward the appointing power.

Before leaving South Carolina for the "lame-duck" session of the Sixth Congress, Senator Pinckney wrote Jefferson asking that he make no nominations affecting South Carolina until Pinckney arrived in the new Capital, stating that there was much information about South Carolina's political situation that Jefferson should know before deciding on appointments. However, before the Senator saw the President-elect, he asked him to ignore this request since, on further consideration, he had decided that it was improper. Jefferson, on the other hand, replied that it was far from improper, that he counted on Pinckney for advice, and would be happy to see him soon.[64] Jefferson, it should be remembered here, was not only the President-elect but also the working head of the Republican Party.

It will have been noted on the foregoing pages that a number of crosscurrents affecting the Senate's share in the appointing power were in motion during the Federalist period. The personality and political acumen of the President, the backing he enjoyed from public opinion, the state of party organization and feeling, the President's relationship to his party, the caliber of his appointees, the attitude of the Senators themselves—all these affected the part played by the Senate in the appointing process. The precedents set during the period were thus somewhat contradictory: It was recognized in theory that the President alone was responsible for initiating appointments, the Senate's role being merely that of confirming or rejecting the President's nominees; at the same time, congressional—as distinguished from purely senatorial—participation in the nominating process became a common practice.

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[62] Letter, Hillhouse to Wolcott, Feb. 19, 1801, Gibbs, *op. cit.*, II, 493–494.

[63] Wolcott to Adams, Mar. 28, 1801, *ibid.*, II, 497.

[64] Letters, Pinckney to Jefferson, Jan. 24, 1801, and Feb. 9, 1801; letter, Jefferson to Pinckney, Mar. 6, 1801, cited in Wolfe, *op. cit.*, p. 161.

With respect to the hopes and fears of 1787–88, two developments were quite clear cut: Contrary to the anticipations of many of the fathers of the Constitution, the Senate did not turn out to be a Presidential council in the sense of a group of advisers with whom the President freely conferred concerning appointments to office. On the other hand, the fears of the Constitution's opponents that the Senators would use their confirming power to entrench themselves in high places in the National Capital turned out to be merely another bad dream of "the men of little faith."

CHAPTER VIII

AN ADVISORY COUNCIL TO THE PRESIDENT: TREATIES

He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur * * * (U.S. Constitution, art. II, sec. 2).

At the Constitutional Convention the critical importance of the treaty power was fully recognized and assignment of authority in this field was given the most earnest consideration.

At one stage the committee of detail recommended that the Senate alone exercise this power as well as that of appointing Supreme Court Judges and Ambassadors. However, it was finally decided to lodge these powers in the Executive, subject to the advice and consent of the Senate. Careful comparison of the wording of the provision dividing the treaty power between President and Senate with that assigning the appointing power will show that the initiative of the President is specified less clearly in the former field. Apparently the fathers of the Constitution expected the Senators to take part in the initial as well as the ratifying stages of the treatymaking process.[1]

Since many constitutional provisions were determined by compromise rather than by plan, it is not always correct to list the reasons behind them as though they were the result of deliberate purpose. This warning applies to the provision regarding treaties. However, considering the framers' deliberations as a whole, it is apparent that they had three main purposes in mind when they gave the Senate a share in the treaty power:

(1) To restrain the President, who might otherwise use the treaty power in a despotic and arbitrary manner—in other words, this was part of the system of "checks and balances";

(2) To give the President "advice" in the sense of information and counsel;

(3) To defend the sovereignty of the States, of which the Senate was to be the special representative; giving this great power to the Chamber in which the States were equally represented was thus part of the "Great Compromise" of the Convention.[2]

Developments during the Federalist period relating to the Senate's use of the treaty power fall rather naturally under three principal headings: (1) Those affecting the distribution of power between the Senate and President; (2) those affecting the prerogatives of the House of Representatives; and (3) those dealing with public opinion toward the Senate.

Within the narrow compass of this chapter and the one following, it is impossible to do justice to these highly important developments.

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[1] The clause respecting appointments states: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint * * *" (art. II, sec. 2).

[2] For a discussion of the treaty power as it was debated in the Philadelphia and ratifying conventions, see ch. II, *supra*.

These have, moreover, been discussed in detail by experts in the field of foreign policy. The purpose of these two chapters, therefore, is merely to review the use of the treaty power during this period in order to emphasize the manner in which the purposes of the framers were, or were not, put into practical effect, and also to describe the public's attitude toward the Senate as influenced by the Chamber's use of its treaty power.

Should the Senate Communicate With Foreign Powers?

When the new Government was inaugurated in 1789, and for some months thereafter, there was some confusion as to which of its branches was responsible for day-by-day communications between the United States and foreign nations. Some officials apparently believed that because the Senate was to share the treaty power, it would deal directly with foreign governments. In fact, even House Members maintained that the President had no power to do *anything* in the diplomatic field without prior counselling with the Senate.[3] When the French National Assembly addressed certain documents to the President and Congress jointly, President Washington transmitted them unoponed to the Senate. Vice President Adams, on the other hand, realized that the Senate could not effectively communicate directly with foreign powers and returned the documents to the President. The constitutional provisions providing that the President should receive foreign diplomats and (with Senate approval) appoint American representatives abroad, together with the long-established rule that intercourse among nations was an Executive responsibility, were enough to convince most, but not all, Senators that the Senate was not a proper agency to communicate directly with foreign governments.

The question of whether or not the Senate could properly communicate with foreign powers even through the medium of the executive branch was debated several times during these early formative years.

When the French Government informed the Senate, through President Washington, that Louis XVI had accepted the crown under the recently adopted Constitution, the Senate answered that question in the affirmative by not only approving the President's reply to the French Government but requesting the Chief Executive to express to the French the Senate's good will toward the French nation.[4] In 1794, after the Secretary of State had transmitted to the Senate a letter from the French Committee of Public Safety addressed to Congress, Senate Republicans moved that the President be requested to answer it *on behalf of the United States*, expressing American friendship and good will for the French Republic. The Senate Federalists, however, took exception to the Senate speaking for the whole Nation and the move was defeated by a party vote. When the motion was amended to read "on behalf of the Senate" only, it passed unanimously.[5]

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[3] *Annals*, 1st Cong., 2d sess., Jan. 26–27, 1790, pp. 1118–1130. Observing the wording of the Constitution, some House Members maintained that the document gave the Senate as much power and responsibility in the field of foreign intercourse as the President.

[4] Letter, Tobias Lear to Secretary of State, Dec. 8, 1790, Fitzpatrick, *Writings of Washington*, XXXI, 169 fn.

[5] *Senate Journal*, 3d Cong., 1st sess., Apr. 23, 1794, pp. 113–116.

Two years later the question came up again in connection with a proposed reply to the French Republic's gesture of good will in sending the flag of the Republic to the American people through the President. Virginia's Republican Senator Henry Tazewell moved that the President be informed that the Senate had received this gesture "with purest pleasure" and that he be requested to assure "that magnanimous nation" of the Senate's good will toward France.

This time the Federalist majority went one step beyond its previous position and denied that it was proper for the Senate to ask the President to transmit to a foreign power a communication even on behalf of the Senate only, on the basis that the President alone should speak for the American people.

The central issue of who should speak for the United States in dealings with foreign governments was clouded by the Federalists' and Republicans' contradictory attitudes toward the French Revolution. Federalists not only believed more strongly in executive prerogative, but were cool, to say the least, toward the French Republic. Republicans not only stressed the prerogatives of the legislative branch, but in order to remove the basis of the current impression that the Senate was anti-French, wanted the upper Chamber to adopt a statement expressing enthusiastic friendship for the "sister Republic." Senator Aaron Burr even thought it might be a good idea for the two Houses of Congress once a year to exchange letters of friendship and good will with the French Republic. By a strict party vote Tazewell's motion was amended by striking out the request that the President transmit to France the Senate's expression of good will, leaving only Senate approval of the President's own friendly reply. In spite of the collateral issue involved, the net result here was a precedent against the Senate communicating even its own sentiments to a foreign power.[6]

The Senate and Negotiation of Treaties

At the time the new Government under the Constitution went into operation it was widely believed that the Senate was to be a true "council of advice" to the President. As has been previously noted, President Washington (who, as President of the Constitutional Convention, was well acquainted with the opinions and purposes of the framers) expressed himself categorically in favor of such a procedure:

> In all matters respecting treaties, oral communications seem indispensably necessary, because in these a variety of matters are contained all of which not only require consideration, but some of them may undergo much discussion; to do which by written communication would be tedious without being satisfactory.[7]

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[6] *Annals*, 4th Cong., 1st sess., Jan. 5–6, 1796, pp. 28–36. This was one of the few Senate debates of the period recorded for posterity. In the course of the debate, Ellsworth gave the information referred to above regarding Senate action on the communication from France relating to Louis XVI's acceptance of the new French Constitution.

In 1792 the Senate failed to adopt a motion to the effect that it was not convinced certain permanent ministries abroad were in the American interest. The President's nominations of ministers to Paris, London, and The Hague were approved after considerable discussion when the Senate professed itself convinced that a special need for the ministries existed. For some years the Senate continued to inquire into the expediency of diplomatic missions. See Harris, *op. cit.*, p. 281, and Story, *op. cit.*, II, 357.

[7] Letter, Washington to Madison, Aug. 9, 1789, Fitzpatrick, *Writings of Washington*, XXX, 374–375.

The President expected to meet the Senate either in its own Chamber or at his own residence, meanwhile looking forward to the day when the Government would acquire its own buildings and an executive chamber would be provided in the Capitol where he could meet with the Senate on even terms. The Senators' expectations were expressed by Butler of South Carolina: "Treaties to be gone over, clause by clause, by the President & Senate together, and modeled." [8]

How this idea worked out in actual practice the one time it was tried has been told and retold so frequently that it would be superfluous to repeat the story in detail here In fact, the whole story of the roles of the Chief Executive and Senate in negotiation of treaties during the period under study has been told so clearly and concisely by Ralston Hayden in *The Senate and Treaties, 1789–1817* that it is hardly necessary here to do much more than summarize his principal conclusions concerning the Senate's action on the more significant treaties considered during the period. However, some conclusions based on Hayden's information will be added.[9]

The first international agreement to which the Senate gave its advice and consent was the Consular Convention with France, which had already been negotiated when the Government under the Constitution was inaugurated. Senate action on this convention involved two highly important points. The first was the direct and personal intercourse between the Department of Foreign Affairs and the Senate leading to ratification. President Washington did not come to the Senate Chamber in person to discuss the convention but, at the Senate's request, Secretary of Foreign Affairs John Jay did, besides furnishing written opinions and other documents. The second point of interest is the motive which led the Senate to approve the convention in spite of its objection to the document's provisions—a conviction that the faith of the United States had been pledged because the convention followed the instructions given the American minister who negotiated it and because the Continental Congress had specifically promised to ratify such an agreement.[10]

These circumstances emphasized at the very outset the peculiar position with respect to international law in which the United States was placed by the division of the treaty power between two branches of the Government. When the Executive and the Senate worked hand in hand from the negotiation stage onward, the faith of the United States would be pledged to ratify a treaty following their joint instructions. But when—as later became the practice—one branch alone negotiated a treaty, which would then be subject to ratification by the other, it became necessary for the United States to seek exception from the ancient principle that the good faith of a nation is pledged to ratification of a treaty the terms of which follow the instructions to its negotiators. Otherwise the treaty power of the Senate would be a mere formality.

The first treaties (in the strict sense) submitted to the Senate were the Treaties of Fort Harmar, negotiated by the Governor of the Western Territory in January 1789. Senate action on these agreements established important precedents. Following the recommendation of President Washington but contrary to the opinion of its own committee based on the established practice of considering Indian treaties fully completed upon signature (without solemn ratification), the Senate decided that a treaty with an Indian tribe should be subject to formal Senate ratification like any other treaty. Submission of these treaties to a Senate committee established another precedent. On one of the treaties—the one negotiated with the Six Nations—the Senate declined to act one way or the other because of the delicate situation arising from the possibility of prejudicing the claims of Massachusetts and New York and their respective grantees.[11] In its failure to ratify this treaty, the Senate was, in a sense, acting as defender of the States—as many of the framers of the Constitution intended.

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[8] Memorandum of Vice President Adams, Adams, *op. cit.*, III, 409.

[9] Ralston Hayden, *The Senate and Treaties, 1789–1817* (New York: Macmillan Co., 1920), pp. 1–129. See pp. 217–226 of that work for bibliographical material on sources and pertinent secondary works.

[10] *Ibid.*, pp. 4–10.

In considering this treaty, as in the case of the Consular Convention with France, the Senate was careful to inquire whether the negotiator had followed his instructions and thereby committed the faith of the United States. Also following that precedent, a representative of the President, this time Secretary of War Henry Knox, attended the Senate.

As previously mentioned, the Senate on August 21, 1789, adopted rules providing for meetings with the President at such places as he might designate. The following day, a desire to frame the terms of a proposed treaty with the Creek Indians brought President Washington to the Senate Chamber for his one and only attempt to put into practice his previously announced intention to discuss with the Senators in person the provisions of treaties in their formative stage. The subsequent conference—the strained and awkward character of which was so vividly but captiously described by Maclay—is familiar to all students of the period.[12] However, in view of the importance of its consequences, it may be well to review some of the circumstances under which the meeting took place.

There were, first of all, some favorable circumstances. The general problem involved in the proposed treaty was well known to the Senators. Two weeks previously the President had placed before the Senate the latest facts concerning the disputes with these Indians. Both Houses favored an attempt to reconcile the differences by treaty, having provided by law for the expenses of the proposed negotiations. The Senate had confirmed three Commissioners nominated by the President. The President came to the conference with a well-organized agenda and with all necessary papers, and was accompanied by Secretary Knox, who was intimately acquainted with the problems involved. The Senate at that time had only 22 Members, about the size of a modern committee. They were not yet divided into two hostile party groups. Almost all of them sincerely admired the President and were anxious to cooperate with him.

However, these favorable factors did not compensate for the unfavorable ones. Because no such meeting had been held before, neither President nor Senate enjoyed the sureness that comes from following accepted precedents. Due to the location of Federal Hall at the head of Broad Street—the traffic of Wall Street clattering by just below the large Senate Chamber windows—the noise of carriages outside drowned the voices of the speakers so that the sashes finally had to be closed. Instead of more urbane and accommodating Senators taking the lead in the discussions, that was apparently left to the censorious and argumentative Maclay, who supported a move to have the proposed treaty submitted to a Senate committee, thereby defeating every purpose of the President's coming. Perhaps most important of all, the austere and dignified Washington was not suited to the give-and-take of this kind of discussion, while the Senators for their part were somewhat overawed by the illustrious President. As Maclay put it, the Senators suffered from "a shamefacedness, or I know not what." [13] It is not surprising, therefore, that the "chief result of the first conference was that it was the last," to use Hayden's succinct summary.[14]

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[11] *Ibid.*, pp. 11-16.

[12] The plural "conferences" should perhaps be used since the President met with the Senate twice, on Saturday, Aug. 22, and on Monday, Aug. 24. The second meeting progressed somewhat more smoothly than the first, but on the whole both President and Senate considered the meetings quite unsatisfactory.

The President continued to keep the Senate informed about the progress of negotiations with the Creeks, and the Senate for its part formally approved a proposed secret article to be added to the treaty. However, even though such close cooperation made the treaty as much the work of the Senate as of the President, it was still considered necessary to have the Senate's formal "advice and consent" after the treaty had been completed and signed.

Even if the President-Senate conference on the Creek Treaty had been satisfactory and a strong precedent set for similar conferences in the future, they would no doubt have had to be discontinued in time. The Senate became larger and larger in membership and less suitable for such conferences. Moreover, as the duties of the executive branch multiplied, the President became less able to keep in his own hands negotiations of this kind, becoming more and more dependent on his subordinates in the State Department. However, if personal meetings with the Senate to frame the terms of treaties had become the established practice, the Senate might have adjusted itself to its larger size by some such device as substituting its Foreign Relations Committee for the entire membership in the preliminary phases, which could then have worked closely with such State Department officials as might be named by the President. Such a procedure would have perpetuated Senate participation in framing the terms of treaties in the early stages. If this had been the case, the good faith of the United States would have been committed to ratification of treaties formed according to the terms laid down by the Senate and executive branch jointly—and the future treaty history of the United States would have been somewhat different.

This is indulging in some speculative "ifs" but the possibilities are mentioned to emphasize the importance of Washington's lack of success in his only personal conference in the Senate Chamber. Added to his decision to submit nominations for appointments to office by written message only, failure of the conference spelled the end, for practical purposes, of the Constitutional Convention's plan to utilize the Senate as an "advisory council to the President" in the sense of a group of men with whom the President would sit down and personally discuss the advisability of appointments and treaties.[15]

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[13] Maclay, *op. cit.*, p. 132. Maclay's description of the conference is contained in pp. 128–133 of his *Journal*.

[14] Hayden, *op. cit.*, p. 104.

[15] The President's conference with the Senate regarding the Creek Treaty is discussed by Hayden, pp. 16–29. However, the above "balance sheet" of favorable and unfavorable factors involved in establishing this precedent and the crucial nature of the result were not included by Hayden but are the conclusions of the present writer.

On the day before the Senators gave final approval to the Creek agreement, they received a message from the President asking their advice and consent to the principal terms of a proposed treaty with the Cherokees. Two main differences characterized action on this treaty as compared to that with the Creeks. First, the President's message was submitted to the Senate by his private secretary, nothing being said about the President or Secretary Knox attending the Senate or furnishing further information. Second, the questions put to the Senate were of a more general nature, the Senate in turn discussing the whole matter at will and on August 11, 1790, summarizing its conclusions in two brief resolutions. However, it should be noticed that the Senate still participated in framing the terms of the treaty and considered itself bound to approve a treaty following such terms. The treaty concluded in accordance with this Senate advice was submitted to the Senate more than a year later. It differed from the Senate's terms in one particular, but the departure was not considered objectionable and the treaty was readily ratified.[16]

In rejecting a treaty with the Wabash and Illinois Indians, the Senate in 1794 for the first time exercised its right to refuse its consent to a treaty negotiated by the executive branch. This treaty was negotiated by Gen. Rufus Putnam under instructions about which the Senate had never been consulted. Consequently the Senators felt under no obligation to give their consent. However, the treaty was rejected on its merits (or lack of them), the Senate apparently not taking offense at being excluded from participation in the task of framing instructions to the negotiator. Several other Indian treaties were ratified during Washington's administration even though the Senate had not been consulted in advance. In connection with one of them—the Treaty of Greenville with the Indians northwest of the Ohio—Washington on February 25, 1793, consulted the heads of the department and the Attorney General as to whether or not the Senate should be previously consulted concerning how much land might be relinquished to the Indians in order to preserve peace. The Cabinet replied unanimously that the Senate should not be so consulted, believing that if the proposed line were revealed to the Senate it would become known also to Hammond, the British minister, and the United States might lose all chance of saving anything more than the minimum it had privately agreed to accept. Here was an early indication of distrust of the Senate's ability to maintain inviolate the secrecy of its proceedings.[17]

All in all, these Indian treaties reveal the trend of events—less and less Senate participation in the early stages of treatymaking. In connection with the proposed treaty with the Creeks, the President appeared before the Senate in person to discuss the instructions. In connection with the proposed agreement with the Cherokees, he merely laid before the Senate, by written message, the general propositions upon which he desired to base a treaty. Finally, in connection with negotiations with the Indians northwest of the Ohio, the President under the stress of practical considerations decided not to consult the Senate at all until after the proposed treaty had been signed. This decreasing Senate participation in the preratification stages was naturally accompanied by increasing independence of action on the part of the Senate with respect to bestowing or withholding consent to final ratification.

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[16] Hayden, *op. cit.*, pp. 30–34.
[17] *Ibid.*, pp. 34–39.

The treaty with Algiers, which was finally signed in 1795 after being an object of discussion between President and Senate for nearly 5 years, is especially significant to this study because it involved the question of House participation through the appropriating power.

In 1791 the Senate by resolutions gave its advice and consent to such measures as the President might think necessary for the redemption of American citizens in captivity in Algiers (provided the expense did not exceed $40,000) and also to measures to confirm the existing treaty between the United States and Morocco. However, the President informed the Senate that he would proceed along these lines only when the necessary money had been appropriated by Congress. The Senate then advised the President to suspend action under its previous resolutions—ostensibly because of the condition of the Federal Treasury but more probably because the Senate was unwilling to ask the House of Representatives for advance appropriations and thereby admit that House into a participation in the treaty power. On the other hand, the Senate was not quite ready to advise the President to proceed without an advance appropriation. The following year a Senate committee in a conference with the President made clear that unwillingness to admit the House to a share in the treaty power was the basis of the Senate's stand against seeking an advance appropriation.

Despite the Senate's stand, the appropriation desired by Washington was approved by both Houses before he proceeded with the negotiations. The President meanwhile kept the House as well as the Senate informed regarding American affairs in the Mediterranean. The upshot of the proceedings was that the Senate was unable to maintain its position of excluding the House from participation in this treaty question. The Senate held that the President, upon the advice of the Senate, had the constitutional right to draw money from the Treasury or to borrow it in order to make the first payment on a treaty negotiated with the advice and consent of the Senate, and that it would be the constitutional duty of both Houses of Congress subsequently to appropriate the necessary money. The President and Secretary of State apparently expressed no categorical opinion on that abstract question, but declined to negotiate the treaty until the appropriation was forthcoming.[18] The question became a very acrid apple of discord in 1796 when the House seemed reluctant to appropriate the funds necessary to put the Jay Treaty into effect.[19]

SENATE INITIATIVE AND THE JAY AND PINCKNEY TREATIES

By far the most important treaty ratified during the Federalist period was the Jay Treaty, approved by the Senate in a special session in June 1795. In fact, Senate action on that treaty was the climactic event in the history of the Senate during these early years, with wide ramifications affecting the upper Chamber's relations not only with the President but with the House of Representatives and with the public at large.

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[18] *Ibid.*, pp. 40–52.

[19] See ch. IX, *infra*.

Because of its great importance in fixing the Senate's place in the Nation's political structure, the Jay Treaty controversy will be further discussed in the next chapter. However, the part played by the Senate in the preratification stages had best be summarized here so that its role in this phase of treatymaking can be chronologically traced.

By March 1794, relations between the United States and Great Britain had reached a critical point. Britain's intransigent attitude and the activities of the anti-British party in the United States combined to head the two nations toward the precipice of war. At this point, Senators Ellsworth of Connecticut, Cabot and Strong of Massachusetts, King of New York, and later Robert Morris of Pennsylvania, took the initiative in urging on the President appointment of a special envoy to go to London to try to secure recognition of American claims and adjust the differences which were tending toward an armed conflict. These five constituted the very core of the Federalist leadership in the Senate. They succeeded in convincing President Washington of the advisability of the mission, and after the latter had rejected their recommendation of Hamilton as politically unfeasible, successfully urged upon him, with Hamilton's own support, the selection of Chief Justice John Jay. Thus on the first occasion on which exercise of the treatymaking power was the focal point in a national crisis, procedure followed neither precedent nor *a priori* theory but was adapted to the needs of the occasion.[20]

Appointment of Jay was bitterly assailed by the Senate's minority—first, on the ground that an envoy extraordinary was unnecessary since negotiations could be conducted by our minister resident in London; second, on the ground that a Chief Justice should not be utilized for such a mission, and third, on the ground that Jay had expressed opinions contrary to the just claims of the United States. Perhaps an even greater practical reason for the Republicans' opposition was the fact that their party was sponsoring retaliatory commercial legislation as the means of protecting American rights. At any rate, this opposition gave the Senate opportunity to debate and pass upon not only the choice of envoy but also the question of the mission itself. However, the Senate as a whole did not have opportunity to pass on the instructions which were to govern the envoy's conduct of the negotiations since the Federalist leaders believed—no doubt correctly—that proposals regarding such instructions would provoke irreconcilable controversy and thus defeat the entire project. Consequently, a small group of Senators, including King, Ellsworth, and Cabot, together with Hamilton, met with Jay to discuss the instructions.[21] Here again expediency dictated the procedure, and what amounted to a "Senate policy committee" rather than the Senate as a whole served as a "council of advice" to the President. As Hayden pointed out, the entire procedure resembled the later custom under which the President consulted the Senate through its Committee on Foreign Relations before any important negotiations were embarked upon.[22] However, expediency impelled these Senate leaders voluntarily to relinquish the right of the Senate as a whole to be consulted about instructions to the negotiator—an important precedent. On the other hand, King saw that these Senate leaders by their part in shaping Jay's instructions did not commit the Senate to approval of a treaty negotiated in conformity to those instructions.

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[20] The activities of these five Senators in promoting the mission, opposition to Jay, and his ultimate appointment were discussed in a series of memorandums by Rufus King dated Mar. 10 to Apr. 21, 1794; see King, *op. cit.*, I, 517-523. Hayden discussed the Jay Treaty on pp. 58-94.

[21] King memorandum, Apr. 21, 1794, King, *op. cit.*, p. 523.

[22] Hayden, *op. cit.*, p. 73.

Failure of the President to obtain the advice and consent of the Senate as a body before sending Jay to London did not pass unchallenged. The heads of the Treasury and War Departments approved the procedure, but Attorney General Edmund Randolph believed that it would abridge the rights of the Senate, following the current rule that a treaty approved by a nation's representative acting in compliance with his instructions must be ratified.[23] The procedure was seized upon by the treaty's opponents as further evidence of bad faith on the part of the President and the treaty's proponents.

In 1795, after Jay had returned from England with the completed treaty and the President had submitted it to the Senate, Senator Aaron Burr moved that further consideration of the treaty be postponed and that the Senate recommend to the President further negotiations with Great Britain on the basis of seven propositions which he then submitted to the Senate. The Federalists defeated the motion—not because they considered it improper to recommend that the President attempt to secure a new treaty negotiated in accordance with the Senate's ideas, but only because the seven propositions contained demands so unacceptable to Great Britain as to defeat any prospect of a treaty. Hayden stressed the significance of this motion's defeat: Washington might well have considered passage of such a motion notice that the Senate would in the future expect to participate in framing the conditions under which a proposed treaty would be signed—at least it would have pointed out to him the expediency of always consulting the whole Senate before opening negotiations. The precedent might also have led the Senate to expect and demand such consultation in the future.[24]

The details of the Senate proceedings which finally led to ratification of the treaty by an exact two-thirds vote are shown in the Hayden study. However, because of its effect on the Senate as a "council of advice" one further incident should be emphasized here.

When the Senate first received the completed treaty from the President, it adopted an order laying the Senators under an injunction of secrecy concerning the communications received from the President. After the treaty was approved, the Senate after much disputation adopted a resolution removing the injunction of secrecy but forbidding the Senators to give out any copy of the treaty or any of its articles. This action was apparently based on the belief that the question of publication was a decision which should be left to the President.[25] However, since the resolution did not forbid Senators from making known the substance of the treaty, its contents gradually became widely known. After the appearance of an incomplete sketch in the *Aurora*, Senator Stevens T. Mason, of Virginia, sent a copy of the treaty to its editor, an act applauded by his fellow Republicans who had so bitterly fought the treaty, but denounced as a breach of faith by the Federalists.

Despite their scolding, the Senate's Federalists took no steps to call Mason to account for disobeying the injunction. However, since it was a definite breach of a Senate order involving the secrecy of its proceedings, the President could hardly ignore such an act in considering the question of whether or not the Senate could be trusted with highly secret information.[26] Washington as early as 1792 had expressed a low opinion of the Senate's ability to keep state secrets due to allegedly unguarded remarks of Senator Ralph Izard at a dinner party.[27] Such fears became even more natural when the Senate's membership became sharply divided between Federalists and Republicans, between friends of Great Britain and friends of France.

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[23] Letter. Randolph to Washington, May 6, 1794, Fitzpatrick, *Writings of Washington*, XXXIV, 355 fn.

[24] Hayden, *op. cit.*, p. 79.

[25] Hamilton to Oliver Wolcott, Jr., June 3, 1795, Lodge, *Works of Hamilton*, X, 107.

These doubts were shared by the State Department in the Adams administration. In reply to a list of questions posed by President Adams in 1797 regarding a possible mission to France, Secretary Pickering replied that it would be "highly expedient" to lay before the Senate for its approval a list of instructions for negotiating a treaty with France, as was done in the case of Spain in 1792, "if we could trust to the fidelity of *all* the the members of the Senate." He explained his fears on that score by adding—

> There was no inducement of passions or interest to betray the instructions to Spain; but any instructions, alike communicated, for negotiating a new treaty with France, would reach the Directory sooner than we could send them our minister.[28]

Such doubts must be borne in mind in evaluating the feasibility of the Senate serving as the kind of "council to the President" envisioned at the inauguration of the Government under the Constitution.

With respect to the Treaty of San Lorenzo, better known as the Pinckney Treaty, approved by the Senate on March 3, 1796, the Senate participated in the lengthy preratification stages, first, by confirming appointment of William Carmichael and William Short as commissioners and thereby sanctioning the mission; second, by assenting to the President's request that the commissioners' instructions be extended to include commercial matters; and third, by approving the instructions on the latter subject and adopting a resolution pledging itself to consent to a treaty conforming to these instructions. Instructions covering the other two phases of the negotiations—the Spanish-American boundary and navigation of the Mississippi—were not, however, submitted to the Senate.

After the negotiation of a treaty had been delayed for more than 2 years, the Senate approved the nomination of Thomas Pinckney to conclude the negotiations. As Hayden pointed out, this inconsistent procedure—prior Senate approval of only part of the instructions—shows the extent to which political convenience or necessity dictated the roles played by President Washington and the Senate in the preliminary stages of an important treaty.[29]

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[26] During the special Jay Treaty session, Senator Pierce Butler wrote James Madison enclosing the first page of the treaty and promising to forward successive sheets in each post; see Carroll & Ashworth, *op. cit.*, p. 251 fn, citing letter, Butler to Madison, June 12, 1795, Madison papers in the Library of Congress, vol. XVIII, No. 53.

Mason has been accused of most unworthy motives in making public the text of the Jay Treaty. Howard Crosby Rice suggested that he received 500 guineas ($2,333) through James Swan from the French Government; see "James Swan, Agent of the French Republic, 1794–96," *New England Quarterly*, X (September 1937), 481. This seems unlikely, however, since various others had already made the substance of the treaty known. See also Joseph Charles, *Origins of the American Party System* (Williamsburg, Va.: Institute of Early American History & Culture, 1956), p. 105.

[27] Memorandum in Jefferson's *Anas* dated Mar. 11, 1792, Lipscomb, *op. cit.*, I, 294–295.

[28] Pickering statement quoted in Adams, *op. cit.*, VIII, 542 fn.

[29] Hayden, *op. cit.*, pp. 53–57.

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The last important treaty Washington submitted to the Senate was the one signed with the Creek nation on June 29, 1796. The controversy between the Creeks and the State of Georgia had been described by the President to the Senate the previous year, at which time the President's nominations of three commissioners had been unanimously confirmed.

The treaty as negotiated was considered unsatisfactory by the Georgians. After the President submitted the treaty to the Senate together with a voluminous record of the negotiations, a Senate committee considered the treaty and proposed an amendment to meet some of Georgia's objections. The Senate proper declined to go all the way in meeting Georgia's demands, but did accept an amendment making more explicit the rights of that State to certain land in question.

The Senate here provided a forum before which a State could protest against an alleged violation of its rights by the Federal Government, and although Georgia did not receive all she demanded, she at least secured a thorough discussion of her case and a more explicit statement of her rights. It will be recalled that such defense of the interests of the individual States was one of the roles contemplated for the Senate by the framers of the Constitution, especially in discussing the treaty power. However, there is nothing in the record to indicate that the concession to Georgia granted by the Senate in this instance was not agreeable to the executive branch. Moreover, the treaty as approved by the Senate was still considered unsatisfactory by the Georgians.[30]

During Washington's administration, the Senate was also called upon to advise the President as to whether or not American tariff legislation of 1789 and 1790 contravened the treaty of amity and commerce with France (the Senate advised that it did not) and also to recommend what should be done in the case of the Algerine Treaty, the appropriation for carrying it into effect having proved inadequate. The supplemental appropriation recommended by the Senate and subsequently passed by the House was referred to a committee different from the one which had considered the President's message—indicating that the Senate was already developing separate foreign affairs procedures.[31]

The Senate and Treaties: Adams' Administration

During the administration of John Adams, the custom of confining the preratification work on treaties almost wholly to the Executive was further strengthened. This meant, of course, that the Senate would have a corresponding freedom of action in approving or disapproving the finished document.

The question of whether or not the Senate should share the duty of instructing the negotiators of a treaty came up at the very beginning of his term. As mentioned above, Secretary Pickering believed that it would be highly expedient to share with the Senate the power to instruct the negotiators of a proposed treaty with France if all the Senators could be depended upon to keep the proceedings secret, which, to his regret, was not the case. To the same Presidential query which evoked this comment from Pickering, Secretary of War McHenry replied that the role of the Senate should be confined to cooperation in the appointment of the negotiator and an ultimate "*fiat* or *negative.*"[32]

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[30] Hayden, *op. cit.*, pp. 95–100.
[31] *Ibid.*, pp. 102–103.

Meanwhile, excluded from the negotiation stage of treatymaking, Senators were well aware of the influence they could exert on the President in this stage by their action affecting his choice of negotiators.

The opposition of more than one-third of the Senate to nomination of John Quincy Adams as Minister Plenipotentiary to Prussia in 1797 seems to have been directed not against continuance of treaty relations with that nation, but primarily against establishment of a permanent ministry at Berlin. In 1798, on the other hand, when the younger Adams was nominated as commissioner to secure a treaty with Sweden, the Senate's Republican minority showed that it understood the use of opposition to the President's choice of ministers to express disapproval of a treaty. Although realizing that they could not muster enough votes to defeat the nomination, the Republicans tried to muster a negative vote large enough to convince the President that any treaty he negotiated with Sweden could not obtain the necessary two-thirds vote and that he had therefore better drop the project. In this instance the maneuver failed, but it is significant as an illustration of a minority's method of serving notice on the President as to what to expect when a treaty came up for Senate approval.[33]

One development in the field of Senate-President relations in the area of foreign relations which was not mentioned by Hayden was the controversy between Adams and the Senate Federalists regarding appointment of a mission to France in 1797 This controversy was important not only as an illustration of Adams' strained relations with the Federalist leaders and as an incident in the breakup of Federalist unity, but also as a further crystallization of the relative powers of President and Senate in activities designed to result in treaties.

In an effort to solve the current difficulties with France, the President determined to send a mission to Paris in the person of William Vans Murray, American Minister to the Netherlands. Without previous consultation with his party's leadership in the Senate or even with the members of his own Cabinet—and yet knowing that the anti-French Federalists could be expected to oppose such a mission—the President sent Murray's name to the Senate for confirmation. The Senate Federalists were thunderstruck. Yet, although feeling as they did about the French Republic and incensed at the President for not taking them into his confidence, they still did not want to take the drastic step of vetoing the nomination. After a 2-day delay, the nomination was referred to a committee of five, all Federalists and headed by the highly partisan Theodore Sedgwick of Massachusetts. While Sedgwick wrote to Hamilton for advice as to what course to take, the committee sought an interview with the President to learn his reasons for the appointment and if possible to alter his decision and thereby save the Federalists from the horns of their dilemma.[34]

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[32] McHenry to Adams, cited in Adams, *op. cit.*, VIII, 542 fn. (This exchange of correspondence and its implications are not mentioned by Hayden.

[33] Hayden, *op. cit.*, pp. 112–114.

[34] John C. Hamilton claimed that Adams was "lured by the pledge of Democratic support," citing Pickering as his authority; see his *History of the Republic of the United States of North America as Traced in the Writings of Alexander Hamilton and of His Contemporaries* (New York: D. Appleton & Co., 1857–64), VII, 299–300.

If the Senate were truly a "council of advice" to the President, such an interview would seem to be a very natural procedure. However, that concept had by this time been so far discarded that even Sedgwick admitted that such a "direct communication between the President and Senate" would be "an infraction of correct principles" only defensible because of the "wild and irregular starts" of the President's "vain, jealous, and half frantic mind."[35] Moreover, that type of cooperation between the executive and legislative branches was entirely foreign to Adams' idea of good government, which emphasized a strict separation of powers to prevent tyranny. Added to this idea was Adams' sensitiveness concerning his own station, which made it difficult for him to brook interference with what he considered his due prerogatives, as well as a lack of tact in dealing with the Senate. He considered the Sedgwick committee's effort to sway his judgment a personal affront and as a gauntlet thrown to him by the Senate Federalist leaders, which he was not loath to pick up:

> But vanity has no limits; arrogance shall be made to feel a curb. If any one entertains the idea, that, because I am a President of three votes only, I am in the power of a party, they shall find that I am no more so than the Constitution forces upon me. If combinations of senators, generals, and heads of department [Sedgwick, Hamilton, Pickering] shall be formed, such as I cannot resist, and measures are demanded of me that I cannot adopt, my remedy is plain and certain. I will try my own strength of resistance first, however.[36]

Despite this objection to attempted senatorial "dictation," Adams acquiesced in the proposed interview on the assurance that it would not be considered official. He was, however, adamant in his nomination of Murray. He declared again and again that to defend the Executive against oligarchic influence it was absolutely essential that he insist on a decision on the nomination. "I have," the President told the committee, "on mature reflection, made up my mind, and I will neither withdraw nor modify the nomination."[37] On the other hand, correctly fearing that the Senators' opposition to the mission would result in rejection of Murray's appointment, Adams compromised to the extent of naming two additional commissioners, Oliver Ellsworth and Patrick Henry (the latter replaced by William R. Davie when Henry declined). Hamilton, in the meantime, although as astounded as other Federalists at the President's action, advised Sedgwick that under the circumstances the mission ought to be approved, suggesting the addition of two members to the mission.[38] The three-man commission was then readily confirmed, but even this solution of the controversy did not eliminate the ill-feeling between the President and the Senate majority.[39] The net result of the incident was to reemphasize the separate natures of the powers of President and Senate.

As Hayden pointed out, the Senate's action in connection with the resultant Convention of 1800 with France was important for two reasons: First, the manner in which the Senate amended the convention before approving ratification was a "striking example of the extent to which that body can influence the treaty stipulations and affect the foreign policy of the United States." Second, it was during consideration of this convention that the Senate added to its standing rules the procedure to be followed when treaties are presented to it for approval or nonapproval.[40]

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[35] Letter, Sedgwick to Hamilton, Feb. 22, 1799, Hamilton, *Works of Hamilton*, V, 217.

[36] Letter, Adams to Attorney General C. Lee, Mar. 29, 1799, Adams, *op. cit.*, VIII, 629. Dauer believed that Adams' "remedy" was resignation of the Presidency, Schachner that he planned an appeal to the country. See Dauer, *op. cit.*, p. 238, and Schachner, *op. cit.*, p. 504.

[37] Letter, Sedgwick to Hamilton, Feb. 25, 1799, Hamilton, *Works of Hamilton*, VI, 399–400.

[38] Letter, Hamilton to Sedgwick, Feb. 21, 1799, *ibid.*, VI, 397. Henry by this time had become a staunch Federalist and with Ellsworth was expected to defend the Federalist interest on the mission.

[39] Letter, George Cabot to Rufus King, Mar. 10, 1799, King, *op. cit.*, II, 551.

According to Secretary Pickering's instructions to the three commissioners, two chief objects were to be included in the proposed treaty with France—recognition of the abrogation of the old treaties and indemnity for injuries to American shipping. In response to these American demands, Napoleon, in effect, gave the American commissioners their choice of either of the two objects sought by the United States—they could not have both. Not having authority to back down on either object, the commissioners were unable to accept one of the alternatives at the expense of the other. They therefore signed a draft of a temporary agreement on both subjects, postponing decision in both cases and agreeing that at a future time the two governments would negotiate upon the abrogation of the old treaties and the payment of indemnities. This proposed agreement was subsequently submitted by President Adams to the Senate.

Unlike that of the commissioners, the authority of the Senate was plenary—it could choose one of Napoleon's alternatives at the expense of the other. This it proceeded to do by expunging from the draft the second article which seemed to recognize the existence of the treaties which Congress had previously declared abrogated, and then accepting the agreement which contained no promise of indemnities. The Senate also amended the agreement by limiting its operation to 8 years. The choice of alternatives which the Senate made by implication was made explicit in later exchanges between the two governments.[41]

Although the effort to make the Senate a true "council of advice" to the President met with failure during these early, formative years, the Senators were obviously intent on exercising fully the Senate's extensive treaty powers.

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[40] Hayden, *op. cit.*, p. 114. These procedures are discussed in ch. XII, *infra*.
[41] *Ibid.*, pp. 114–126.

CHAPTER IX

ATTACK ON THE SENATE'S TREATY POWER

The House Wants a Share

The preceding chapter has outlined developments during Washington's and Adams' administrations which affected the division of the treaty power between the President and Senate. On the whole, this division was made amicably and was based on practical political considerations rather than constitutional theory. The net result of these developments was to exclude the Senate as a body from the earlier stages of treatymaking, but to give it complete freedom of action on the question of approval or nonapproval of treaties as negotiated by the executive branch.

In the meantime, the Senate faced a running threat to its treaty power from the House of Representatives, which jealously guarded what it considered its share of any authority involving the legislative power. Developments in this area were far less amicable and involved the most fundamental issues which divided the American people during this period.

It will be recalled that at the Constitutional Convention the power to approve treaties negotiated by the Executive was given to the Senate rather than the House because of the former's contemplated role as an executive council to advise and check the President, as well as its role as defender of the sovereignty of the States. When the small States were given equal representation in the Senate, representatives of the large States, such as Gouverneur Morris of Pennsylvania and James Madison of Virginia, unsuccessfully tried to hold to a minimum the Senate's treaty power. The Virginia and North Carolina ratifying conventions proposed identical amendments providing that no treaties yielding any territorial, fishing, or navigation claims of the United States were to be ratified without concurrence of *three-fourths* of the *whole number* of Members of *both Houses*.[1]

When constitutional amendments were under consideration in the first session of the First Congress, an effort was made to obtain adoption of such an amendment. It seems to have received little support, however, since it would have upset the distribution of power so carefully worked out at the Convention, and was defeated in the Senate without a record vote.[2] Nevertheless, the effort illustrates the continued hostility in some quarters to the treaty power given the Senate.

Strangely enough, the Senate during this first session was not sufficiently jealous of its prerogatives in the foreign relations field to originate the bill establishing the Department of Foreign Affairs. This bill was prepared by a House committee headed by Representative Abraham Baldwin of Georgia.[3] However, this dependence on the lower House to originate legislation was in line with the general policy of the Senate at that time, as pointed out in chapter VI above.

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[1] See ch. II, *supra*. This proposal also provided that no commercial treaties were to be ratified without concurrence of two-thirds of the *whole number* of Senators.

[2] *Senate Journal*, 1st Cong., 1st sess., Sept. 8, 1789, p. 125.

[3] *Annals*, 1st Cong., 1st sess., June 2, 1789, p. 434.

An actual controversy concerning the treaty power was not long in appearing. During this same first session, President Washington sent the two Houses identical messages suggesting a mission of three persons to negotiate with the southern Indians. The compensation of these three commissioners would, of course, require a congressional appropriation. The House of Representatives was the first to act in response to this suggestion, and on August 11, 1789, its Committee of the Whole directed that a commission of not to exceed three members be appointed and that it be allowed a certain compensation.

Thereupon Theodore Sedgwick, at that time a House Member from Massachusetts, moved to strike out the clause limiting the commissioners to three, on the basis that it was unconstitutional for the House in any way to interfere in the management of treaties, which was the preserve exclusively of the President and Senate. This provoked considerable debate concerning the role of the House with respect to treaties. Page of Virginia claimed that although the President and Senate were the proper agencies for making treaties, the House had a right to determine what money was to be spent. Otherwise the President and Senate could do as they pleased in negotiating a treaty and then call on the House to defray expenses. He claimed that the Constitution did not say that the President and Senate had power to make *all* treaties, and hoped the House would reserve the power to declare what treaties were necessary. He claimed the House had concurrent jurisdiction in formation of treaties by the exercise of its constitutional powers necessary to put them into effect. Tucker of South Carolina added that although the President and Senate had the power to appoint officers, that power was inactive unless the offices were first established by law—that is, by action of both Houses.

Thus, in the very first year of the new Government, Members of the lower Chamber served notice that they were not to be ignored in the operation of the treaty power, using arguments which were to be repeated time and time again in more critical debates.

For their part, defenders of the treaty prerogatives of the President and Senate based their defense on the same type of argument that was to be repeated on their side of the question. For instance, Representative Smith of South Carolina claimed that since the President and Senate had power to make treaties, it lay with them to carry the agreements into effect in such manner as they saw fit, without inquiry by the House.

In this instance, the House adopted the Sedgwick amendment and passed a bill simply authorizing a mission and providing $20,[illegible] for its expenses. The practical question at issue was a comparatively minor one and attracted little public interest at the time.[4]

As mentioned in the preceding chapter, the question of House action on the necessary appropriation was a critical one in connection with putting into effect the treaty with Algiers, which was finally ratified in 1795 after having been the subject of discussion for nearly 5 years. It will be recalled that President Washington declined to follow the Senate's advice to withdraw money from the Treasury or to borrow it for purposes of the treaty in confidence that the House would later agree to the necessary appropriation out of a sense of constitutional duty. The Senate was thus unable to exclude the House from participation in this treaty question.

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[4] *Annals*, 1st Cong., 1st sess., Aug. 10 and 11, 1789, pp. 716–724.

In exploring his possible modes of conduct in connection with this treaty, Washington asked Secretary of State Jefferson if the House would not be obligated to appropriate the necessary money if the treaty were ratified. Jefferson replied that it would be, but that the House might decline to do its duty and it would therefore be "incautious" for the President to proceed without a previous appropriation. The Secretary added that he could conceive of a treaty the terms of which were such that it would *not* be the House's duty to provide the necessary funds. The President, according to Jefferson's memorandum, then remarked that he did not like to place too much authority in democratic hands and that if the House would not do what the Constitution demanded, the Government would be at an end "and must *then assume another form.*" Jefferson replied that since the Senate had been previously consulted when its ratification was required, the same principle should apply to the House when money was required, since the House would be jealous of the purse strings. It will be noted that this recommendation by Jefferson was based on practical political expediency, not on constitutional considerations.[5]

The alleged moral and constitutional obligation of the lower House to appropriate the money required to put into effect a treaty ratified by the Senate was the bone of contention in a tense and bitter controversy between Federalists and Republicans in 1796, when the appropriation required to put into effect certain provisions of the Jay Treaty came before the House. But before that year arrived, the Senate's treaty power had been subjected to a violent onslaught in the arena of public opinion.

THE SENATE UNDER PUBLIC ATTACK

The Jay Treaty aroused partisan passion to a more feverish pitch than any other issue of the closing decade of the 18th century.

Newspapers lent their columns to writers who dipped their pens in the most deadly vitriol in denouncing or defending the treaty. Pamphleteers vied with one another in a contest of satire and invective. Names of most unsullied reputation were dragged in the mire of public abuse. Copies of the treaty were burned amid the ribald shouts of its detractors, Jay was hanged in effigy, speakers were stoned. The treaty seemed to symbolize everything that divided the people between Federalist and Republican, Anglophile and Francophile.[6]

All of this, although highly interesting, would be outside the scope of this study were it not for the fact that the conduct, composition, and powers of the United States Senate were important issues throughout the whole public controversy. The imperious Senators had laid claims to aristocratic prerogatives and had defended titles and ceremonies entirely out of place in a republic. They claimed to be above pressure from the lowly masses. And now they acted on a vicious treaty in secret conclave, in approving its terms trampling on the Constitution and sacrificing the dearest interests of their country on the altar of subservience to the British crown. In a republic of freeborn patriots was there, in truth, any room for such an institution as the Senate? Thus ran the thoughts of the treaty's opponents.

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[5] Entry in Jefferson's *Anas* dated Apr. 9, 1792, Lipscomb, *op. cit.*, I, 305–307. The italics are in the original.

[6] The public furor over the Jay Treaty is described at length, from newspapers and pamphlets of the period, in John Bach McMaster, *A History of the People of the United States* (New York: D. Appleton & Co., 1883–1913), II, 213–230, 243–283. A recent work catching the spirit of the controversy is Bradford Perkins, *The First Rapprochement* (Philadelphia: University of Pennsylvania Press, 1955).

Before presenting the treaty to the Senate, President Washington kept its terms a strict secret. After receiving the text of the treaty, the Senate defeated two proposals to reveal its terms to the public and thereafter debated it behind closed doors. Disarming the opposition by withholding approval of article XII, the Federalist steamroller crushed a number of Republican maneuvers to defeat the treaty and finally on June 24, 1795, by exactly a two-thirds majority, 20 to 10, advised the President to sign.[7]

Copies of the treaty had been circulating privately outside the Senate for some time, despite the President's efforts. The Federalist *Columbian Centinel* of Boston as early as May 30 quoted Bostonians who spoke favorably of it. As mentioned previously, Senator Pierce Butler, in violation of the rule of secrecy, promised to send the text a page at a time to James Madison, then a Member of the House, which was in recess at the time. Numerous rumors about the treaty were afloat. However, the actual terms of the document were unknown to the general public while under consideration by the Senate, and the Members were, therefore, relatively free from public pressure during their deliberations.[8]

Nevertheless, even before the treaty reached the Senate, there were rumblings against it in the Republican press. These were superficially based on the allegedly "high-handed" action of the President in not sharing with the Senate the task of framing Jay's instructions and on an alleged violation of the separation of powers in sending the Chief Justice on an executive mission. Actually, they were inspired by opposition to any amicable negotiation with Great Britain, which in Republican eyes was an impertinent effort by Anglophiles to use the treaty power to override the commercial retaliation policy advocated by the Republican majority in the House.[9] The insincerity of this "defense" of the Senate's right to be consulted in framing the instructions to the envoy is apparent from the Republicans' general animosity toward the Senate and by the fact that the Senate itself apparently voiced little or no objection to the manner in which the instructions were framed.

While the treaty was under consideration at the special session of the Senate, Republicans, for want of information concerning the actual terms of the agreement, denounced the "autocratic" majority of the upper Chamber for its disdain of the people expressed through the secrecy of its sessions.

When at length Senator Stevens T. Mason of Virginia gave his copy of the treaty to Benjamin Franklin Bache, editor of the *Aurora*, and that arch-foe of everything Federalist or British published it in pamphlet form, the previous rumblings against the treaty became a thunderstorm. The first wave of this major opposition to the treaty was directed principally against John Jay, the "archtraitor" who had negotiated it. However, the Senate majority received its share of the obloquy.

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[7] *Senate Executive Journal,* 4th Cong., sp. sess., June 24, 1795, p. 186.

[8] Perkins, *op. cit.*, p. 31.

[9] *Aurora,* Apr. 9. 19, 28, 29, 30, 1794; May 10, 1794; June 10 and 20, 1795. For Senators' share in preparing Jay's instructions see ch. VIII, *supra.*

"The Senate have bargained away your *Blood-Bought* privileges for less than a Mess of Pottage," proclaimed a Portsmouth handbill calling on citizens to appeal to the President not to sign.[10] A meeting at the Camden, S.C., courthouse resolved that Jacob Read and the other 19 Senators who supported the treaty had rendered themselves unworthy of any further public trust.[11] Meanwhile, "the virtuous and patriotic ten" who had voted against the treaty in the Senate were widely toasted in Fourth of July and other celebrations for their refusal to sign this "death warrant of America's liberty." The name most loudly acclaimed as Republican glasses were raised high was that of Stevens T. Mason, the honest Senator who had revealed from the housetop what had transpired in the dark recesses of the upper Chamber.[12]

When the President, after considerable hesitation, finally signed the treaty, he joined John Jay and the Senate majority as the butt of antitreaty maledictions. The Republicans were so incensed over the approval of the treaty that they utilized every argument they could find to prove the wickedness of the treaty and those who had made it possible. Months before the House of Representatives debated the appropriation necessary to put the treaty into effect, the Republican press anticipated most of the arguments used by the antitreaty orators in the lower Chamber, especially the claims that the Constitution's grant to the House of power to appropriate money and to legislate on such subjects as interstate commerce gave to the lower Chamber a full share in deciding whether or not treaties involving such matters should go into effect.[13]

The treaty was unconstitutional, claimed some, because the President had failed to consult with the Senate concerning the instructions to Jay. With more vigor than accuracy, they asserted that the Senate did not even know a treaty was in prospect—that it was the understanding of the upper Chamber that Jay was being sent to the Court of St. James merely to reinforce the American minister's representation of American claims.

In a speech to the citizens of Charleston, Charles Pinckney, former Governor of South Carolina and future Republican Senator, denounced the President's action in sending Jay to London to negotiate a treaty without previous consultation with the Senate concerning proposed terms He claimed that at the time it was asked to confirm Jay's appointment, the Senate was uninformed of the President's intention to negotiate a treaty, that a motion was offered calling on the

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[10] This handbill is quoted in full in McMaster, *op. cit.*, II, 226 fn.

[11] *Aurora*, Aug. 13, 1795.

[12] *Ibid.*, July 7, 9. 10, 15, 16, 1795. Some treaty opponents defended the Senate on the ground that it had been unconstitutionally deprived of opportunity to participate in the negotiation stage and then had no alternative but to advise ratification since adverse action at that stage would have evidenced bad faith on the part of the United States.

[13] *Aurora*, Sept. 22, 1795, quoting "A Citizen of Maine" in Boston *Chronicle*; *ibid.*, Sept. 25, 1795, quoting *Virginia Herald*; "Atticus" in *ibid.*, Oct. 22, 1795; *ibid.*, Jan. 22, 1796, quoting *Kentucky Herald*; *ibid.*, Jan. 26, 1796, quoting "A Freeman" in Boston *Chronicle*.

President to submit to the Senate full information concerning the business upon which the envoy was to be sent, but was defeated.[14]

The fact that the *Senate Executive Journal* does not show a motion such as Pinckney mentioned is not conclusive proof that it was not made. However, three Senate leaders—King, Ellsworth, and Cabot—clearly understood that a treaty might result from the mission, but opposed Senate instructions because they believed an attempt to frame them in the Senate itself would provoke so much controversy as to defeat the mission. King's memorandum describing these events states:

> Ap. 21 Hamilton, Ellsworth, Cabot, and King met Mr. Jay this evening to discuss the subject of Envoyship. All agreed that as the Pr. might give the instructions without consulting the Senate, it would be most advisable so to conduct the business, and that the Treaty, if any shd. be formed, should be signed subject to the approbation of the Senate.[15]

Under the circumstances it is extremely unlikely that these Senators' colleagues did not know that a treaty was in prospect.

Continuing the same type of attack, a "Pittachus" claimed that the President, by consulting with the Senate in 1789 before negotiating with the Creeks, had himself recognized that such prior consultation was constitutionally necessary. His flouting of this constitutional requirement in the case of the Jay Treaty merited his impeachment.[16]

The critics execrated the President and Senate as forming an oligarchy bent not only on forcing on the Nation a disastrous treaty with Great Britain, but on subverting the liberties of their countrymen and making themselves supreme. This dark plot included use of the treaty power to crush the House of Representatives, the lone spokesman of the popular will.

> Let Sparta, let Carthage, let Rome, let Genoa, and let Venice, proclaim the evils with which senates have afflicted humanity. Oh! if the bleeding victims of their ambition could rise, and tell their crimes, a scene of horror would be unfolded that would harrow upon the soul. One legislative assembly, and an executive composed of many persons possessing few powers and no splendor, will soon form the favourite articles of every enlightened politician's creed.[17]

The whole "aristocratic" pageant was brought to view: the haughty reserve of "His Columbian Majesty," his royal levees, celebration of his birthday—and the Senators, enriched by the administration's financial program, serving as his courtiers. The Constitutional Convention had been too strongly swayed by European monarchical examples: What was the great difference between Presidential and British royal prerogative, or between the Senate and the House of Lords? Had the Lords ever shown a greater contempt of the people than the Senate had done? With Machiavellian cunning the framers of the Constitution had made the impeachment process a farce by making the Senators judges of the President—Senators who were the Chief Executive's "machines" and as criminal as himself. But Washington still ought to be impeached by the House even though there was no prospect of conviction by the Senate, as a solemn and awful warning to future Presidents.[18]

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[14] Address by Charles Pinckney quoted in *ibid.*, Aug. 15, 1795.

[15] King memorandum, Apr. 21, 1795, King, *op. cit.*, I, 523.

[16] "Pittachus" in *Aurora*, Nov. 18 and 26, 1795. See also "Belsarius" in *ibid.*, Sept. 11, 1795; "A Political Watchman" in *ibid.*, Oct. 19, 1795; address by Caesar Rodney at Wilmington, Del., Aug. 4. 1795, quoted in *ibid.*, Sept. 14, 1795.

[17] "Casca" in *ibid.*, Oct. 16, 1795.

There were dark tales that the treaty had been pushed through the Senate by corrupt means. According to one bit of gossip, one Senator (presumably Gunn of Georgia) had been induced to vote for the treaty in exchange for an assurance that there would be no congressional investigation of the Georgia land speculation scandal.[19] Pierre Adet, the new French Minister, reported to his Government that Gunn and Jacob Read had been bribed to vote for the treaty, one by an Indian treaty favorable to his State, the other by £1,500 in British gold.[20] However, since he offered no proof, it is likely that he was merely repeating the gossip of Francophile friends. Other charges were less specific, but gave the distinct impression that sinister forces had been at work behind the closed doors of the Senate Chamber.[21]

Following the French Revolutionary line, Republicans who had formerly praised the unicameral French assemblies now, with marked lack of prescience, professed greatly to admire the Constitution of 1795 (year III), which provided for two Houses but gave the upper Chamber power merely to reject or approve legislation suggested by the lower, and assigned the former no extralegislative powers such as those enjoyed by the United States Senate. The five-man executive (Directory) with no power over legislation or finance was also highly praised. Under such a system there would be no possibility of the kind of corrupt collusion between Executive and upper Chamber which the Republicans claimed had made the Jay Treaty possible. This new French Constitution, proclaimed the *Aurora*, was "the most perfect model of Government which has ever been adopted by any nation"—broadly implying that the United States should follow its example and reduce the powers of the President and Senate.[22]

Antitreaty, anti-Senate activities had the full support of Thomas Jefferson, who 2 years after adoption of the Jay Treaty became President of the Senate. In letters to Republican leaders he castigated the Senate for subservience to Great Britain, abusing its powers, and flouting the popular will, meanwhile encouraging House Members firmly to resist such usurpations. In May 1794, after the Senate had defeated the House Republicans' favorite measure—a nonimportation bill designed to cripple British trade in retaliation for infringement of American rights—Jefferson wrote Madison from Monticello that the Senate had abused its power to check too-hasty House action by completely checking the people's will as well. He recommended that Senators' terms be shortened and thus "complete the experiment, whether they [the Senators] do more harm than good."[23] After the Senate had approved the Jay Treaty, he did his best to encourage

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[18] *Ibid.*, Sept. 25, 1795, quoting a model petition circulated by the *Virginia Herald*; *ibid.*, Nov. 26, 1795; "A Querist" in *ibid.*, Dec. 23, 1795, quoting from the New York *Argus*; *ibid.*, Jan. 7, 1796; *ibid.*, Feb. 10, 1796, quoting a remonstrance circulating in North Carolina; *ibid.*, June 8, 1796, quoting "Agriculturer" in the (Savannah) *Columbian Museum*.

[19] *Ibid.*, Mar. 8, 1796.

[20] Letter, Adet to Committee of Public Safety, June 25, 1795, Frederick J. Turner (ed.), *Correspondence of the French Ministers to the United States, 1791–97, American Historical Association Annual Report, 1903* (Washington: Government Printing Office, 1904), II, 738.

[21] For an example, see *Aurora*, June 8, 1796.

[22] *Ibid.*, Oct. 30, 1795. See also *ibid.*, Aug. 25, 1795, and a letter from an American in Paris dated Nov. 18, 1795, published in *ibid.*, Feb. 22, 1796.

[23] Jefferson to Madison, May 15, 1794, Lipscomb, *op. cit.*, IX, 288–289.

Republican lieutenants to endeavor to give the House a share in the treaty power. Writing to Monroe he said:

> On the precedent now to be set will depend the future construction of our Constitution, and whether the powers of legislation shall be transferred from the President, Senate, and House of Representatives, to the President and Senate, and Piamingo or other Indian, Algerine, or other chief.[24]

In at least two instances, attacks on Senators who voted for the treaty did not stop with mere words. In Philadelphia a mob marched to the palatial home of Senator William Bingham, ceremoniously burned a copy of the treaty, pelted the house with stones, and broke a number of windows.[25]

More dramatic was mob treatment of Senator Humphrey Marshall, the stormy petrel of Kentucky politics, a Federalist in a strongly Republican State, who not only had the temerity to vote for the treaty but named his eldest son "John Jay."

The Kentucky Legislature officially condemned Marshall's vote by instructing the Kentucky Senators to vote against the treaty should British rejection of the Senate amendment bring the document before the Senate again. The citizens of the State burned Marshall in effigy, denounced him in public meetings, and vilified him in print. Former friends avoided him or looked upon him askance. At Frankfort he was stoned.[26] The climax came when he was captured by a mob and faced an ignominious ducking in a Kentucky river. What happened then is best described by his biographer, A. C. Quisenberry:

> Arriving on the bank of the river, the Senator called a halt and with inimitable humor, coolness, and courage said in substance, "My friends, all this is irregular. In the ordinance of immersion as practiced in the good old Baptist church, it is the rule to require the candidate to relate his experience before his baptism is performed. Now in accordance with established rules and precedents, I desire to give my experience before you proceed to my immersion."
>
> Such an appeal coming from such a man tickled the humor of the mob, and he was placed upon a convenient stump and ordered to relate his experience. Proceeding first in a way to humor the mob, the Senator finally warmed to his work and with all the pent-up indignation of a man who felt that he was approaching the culmination of a long series of outrages and injustices, he fairly blistered the miscreants with the well-timed fury of a scathing tongue, until one by one they sneaked away shamefacedly and left him the triumphant master of the field.[27]

But for most Senators there was little humor in the situation. Their endorsement of the Jay Treaty not only subjected them as individuals to bitter reproach but brought the Chamber as a whole to a nadir of unpopularity, which under slightly different circumstances might have resulted in a drastic reduction of its powers.

THE HOUSE, THE TREATY POWER, AND $80,808

After the treaty had been signed in England by the American envoy and the representative of the British Crown, approved after full debate by a special session of the Senate, signed by President Washington, and officially ratified by representatives of the two Governments, the treaty was not yet ready to be put into full effect. A final obstacle was the Republican-controlled House of Representatives, to which (in addition to the Senate) the administration had to apply for the funds necessary to put certain provisions of the treaty into effect. This set the stage for a "great debate" on the treaty power—the first full-dress examination of that power since the Constitution had been in effect. This debate took place against a background of great public excitement and vigorous efforts on the part of proponents and opponents of the treaty to sway both public opinion and congressional votes.

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[24] Jefferson to Monroe, Mar. 21, 1796, *ibid.*, IX, 329. See also Jefferson to Madison, Sept. 21, 1795, *ibid.*, IX, 310; to Rutledge, Nov. 30, 1795, *ibid.*, IX, 314; to Giles, Dec. 31, 1795, *ibid.*, IX, 315.

[25] *Gazette of the United States*, July 27, 1795.

[26] "Humphrey Marshall," *Dictionary of American Biography*, XII, 310.

[27] Anderson Chenault Quisenberry, *Life and Times of Honorable Humphrey Marshall* (Winchester, Ky.; Sun Publishing Co., 1892), pp. 59–62. As authority for this story, Quisenberry cited the *Kentucky Gazette* for Sept. 4, 1806, and Marshall's own reference to the event in the same paper, Oct. 16, 1806. It should be noted that this was 11 years after the incident occurred; quite possibly the story may have acquired some of its particulars in the interim.

The "great debate" began on March 7, 1796, when Representative Edward Livingston, Republican stalwart from New York, defended his resolution calling on the President to provide the House with all the documents relating to Jay's negotiations, on the plea that the Constitution vested in the House discretion as to whether to put the treaty into effect or to refuse its sanction. Livingston claimed that the papers were necessary to guide the House in making its decision. For 2 full weeks protreaty Federalists arrayed themselves against antitreaty Republicans in a battle of words and fine-spun argument on the constitutional issues involved. Every word in the Constitution affecting treaty and legislative powers was dissected and redissected to reveal every shade of meaning, with frequent appeals to ancient authorities, the precedents of Parliament, and the intentions of the framers—all against the backdrop of the practical issue of the treaty itself. The result was approval of a resolution calling upon the President to produce the papers.[28]

The President's prompt and categorical refusal to submit the papers provoked renewed debate as the House considered a reply to the constitutional position taken by the President. Then on April 13, 1796, Theodore Sedgwick of Massachusetts moved that provision ought to be made by law for carrying into effect four recently concluded treaties—including the one with Great Britain. This motion inspired the antagonists with new vigor and the debate over the treaty power was continued for 2 more weeks, this time with the Jay Treaty itself more closely in focus. Finally, on April 30, 1796, after nearly 2 months of oratory, the House agreed to appropriate $80,808 to put the treaty into effect.[29]

Since this House debate covers about 700 columns of fine print in the *Annals*, it is obviously impossible here to follow closely the trend of the arguments.[30] However, in view of the fact that one of the most important and distinctive powers of the United States Senate was on trial, a summary of the principal arguments on both sides and an evaluation of the result are essential to a proper understanding of the Senate's early years.

The immediate basis of the lower Chamber's involvement in the Jay Treaty question was, of course, the fact that an appropriation was necessary and the Constitution undeniably gave the House a full share of the appropriating power. The House was naturally very jealous of its power over the purse, a power which the antitreaty forces claimed would be a nullity if the lower Chamber were duty-bound automatically to vote an appropriation for an object in which it did not have an agency. For example, Representative John Nicholas of Virginia declaimed that he was not sent by his constituents to pay implicit obedience to another department of the Government, but to use his own judgment. In common with many of his colleagues, he appealed to the precedents of England (notwithstanding the Republicans' professed preference for the French system). As the popularly elected body, the House of Representatives had the same authority over the purse as the House of Commons enjoyed.[31]

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[28] *Annals*, 4th Cong., 1st sess., Mar. 24, 1796, pp. 759–760.
[29] *Ibid.*, Apr. 30, 1796, p. 1291.
[30] *Ibid.*, Mar. 7 to Apr. 6, 1796, pp. 427–783; Apr. 13, 1796, to Apr. 30, 1796, pp. 940–1291.

To this type argument, friends of the treaty replied that the British practice was no proper precedent, since the United States had a written Constitution which specifically divided the Federal Government's powers among the various branches of the Government. Besides, in the United States the Executive and the upper Chamber were as much the representatives of a free people as the lower House, being as truly, although not as immediately, chosen by the people as were the Representatives. Thus the necessity which existed in England of checking an otherwise irresponsible branch of the Government did not exist here.[32]

On the contrary, the Federalists claimed that the House was under moral obligation to pass an appropriation necessary to put a legally adopted treaty into effect. The House could as well withhold the salary of a President or a Member of Congress because it thought the electors' choice was an improper one as to withhold funds from such a treaty. Fisher Ames eloquently protested that denying to the House discretion to withhold the necessary appropriation was not "coercion" except insofar as it was the "authority of principle, the despotism of duty." Only tyrants "complain that principles are restraints." The Federalists also claimed that failure to put a legally adopted treaty into effect would be an act of faithlessness for which Americans would roundly condemn a foreign power.[33]

The Republicans did not limit themselves to the claim that the House had power to withhold appropriations. They also claimed that the Senate's treaty power was checked by the concurrent power of the House derived from the legislative authority vested by the Constitution in both Houses. In this claim, Republican House Members echoed the plea of Republicans in the Senate, who, during the upper Chamber's debate on the treaty, unsuccessfully introduced a motion denouncing the treaty as an invasion by the President and Senate of the lower Chamber's right to participate in the power to regulate commerce with foreign nations.[34] In the House, Madison contended that the Constitution just as expressly and exclusively vested in the whole of Congress the power to make laws as it vested in the President and Senate the power to make treaties. Albert Gallatin declared that a treaty embracing subjects like commerce which are within the sphere of the powers granted by the Constitution to Congress as a whole would not be unconstitutional, but would not become the law of the land until sanctioned by the House as well as the Senate. Representative John Page of Virginia went further and claimed that the Jay Treaty was unconstitutional because it took from Congress as a whole rights vested in both Houses, such as power to regulate trade and to provide uniform rules of naturalization, while its arbitration commissions would interfere with the Federal judiciary. Treaties, as contemplated by the Constitution, said Page, were principally treaties of peace, amity, neutrality, or alliance; power to make treaties of commerce and navigation could scarcely have been within the design of the framers of the Constitution, since they knew (according to Page) that the commercial interests of the United States could be better protected by unilateral legislation, such as the nonimport measure contemplated by the House when the group of Senators initiated the Jay mission.[35]

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[31] *Ibid.*, Mar. 8, 1796, p. 445.

[32] *Ibid.*, Mar. 9, 1796, p. 454; Mar. 14, 1796, p. 552; Apr. 28, 1796, p. 1254. This argument is an interesting example of how Federalists denied the Senate's "House of Lords" role when it suited them.

[33] *Ibid.*, Mar. 9, 1796, p. 454; Apr. 28, 1796, pp. 1244, 1252.

[34] *Senate Executive Journal*, 4th Cong., special session, June 24, 1795, pp. 185–186.

As further confirming the House's concurrent authority in the treaty field, the Republicans cited the Constitution, article I, section 8:

> [The Congress shall have Power] to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

They reasoned that since the President and Senate were agents of the Government of the United States, powers such as the treaty power granted to them by the Constitution were, under the terms of this provision, subject to the general legislative authority of Congress as a whole. This paragraph, they claimed, gave Congress, including the House, a general superintendency over all affairs of the Government.[36]

The Republicans claimed that this participation by the House in treaties dealing with matters of domestic concern was part of the system of checks and balances. For example, Representative James Holland of North Carolina maintained that at his State's ratifying convention friends of the Constitution like himself had met objections to allegedly dangerous concentration of power in the President and Senate by assuring the critics that the Constitution limited the latter's treaty power by giving authority to make commercial regulations to Congress as a whole.[37] Gallatin claimed that the House was not an active power in making or repealing treaties, but only a negative and restraining power on those subjects on which Congress had a right to legislate. If the treaty power were unchecked, even appropriations could be made by means of treaty. Republicans claimed that the weakness of the Federalist claim that the treaty power was "completely paramount in its authority" was that if the treaty power alone could perform any act for which the authority of Congress as a whole were otherwise required, it could perform *every* act for which such authority were required and thus completely nullify the power of the popularly elected House.[38]

The Federalists, on the other hand, from beginning to end of the debate maintained that the Constitution unequivocally gave the treaty power to the President and Senate in words as express and positive as could be found. If the framers had intended that the House should have any agency in treaties, they would have said so in express terms. They did not, and therefore the House had no right to adopt, reject, or even judge treaties, which if constitutionally made were the supreme law of the land. As long as the President and Senate exercised their power in harmony with the Constitution, their acts could not be controlled by the House. It would be a "solecism" for the Constitution to give the President and Senate full powers on a given subject and yet lodge a power elsewhere to annul acts proceeding from those powers. According to the Federalists, the only constitutional grant of authority under which the House could legitimately call for the Jay papers was the impeachment power. They pointed out that that power was not involved in the current controversy since the treaty's opponents themselves admitted the President was above suspicion, and intimated no intention of calling any one else to account.[39]

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[35] *Annals*, 4th Cong., 1st sess., Mar. 9, 1796, p. 465; Mar. 11, 1796, pp. 508–509; Mar. 15, 1796, pp. 558, 575–577; Apr. 6, 1796, pp. 772–781; Apr. 20, 1796, pp. 1097–1098.

[36] *Ibid.*, Mar. 15, 1796, p. 558; Mar. 16, 1796, pp. 590–591; Mar. 18, 1796, p. 629.

[37] *Ibid.*, Mar. 14, 1796, p. 546.

[38] *Ibid.*, Mar. 9, 1796, pp. 465–467; Mar. 10, 1796, pp. 488–490; Mar. 11, 1796, pp. 508–509; Mar. 24, 1796, p. 745.

The friends of the Jay Treaty threw back at their opponents the "checks and balances" argument. Roger Griswold pointed out that the legislative power (including that of regulating commerce) was subject to limits which that power must experience in all governments. Under the Constitution, it was limited by the treatymaking power vested in the President and Senate only.[40]

The Federalists claimed that their opponents in various ways had admitted the exclusive power of the President and Senate over treaties. Quoting at length from the debates of the Virginia ratifying convention, Sedgwick pointed out that Madison, in discussing safeguards against abuse of the treaty power, had not even mentioned the safeguard he now contended for—House participation. William Smith, of South Carolina, called attention to meetings and petitions of the previous summer requesting the President to withhold signature from the treaty, all of which proceeded on the idea that the treaty would be the law of the land as soon as sanctioned by the President. Even more to the point was the recent action of the Virginia Legislature proposing an amendment to the Constitution giving the House certain authority over treaties. Surely such an amendment would be unnecessary if the House already had such power. Smith believed that the defeat of this amendment by every legislature which had discussed it was proof that the people were against such a change.[41]

Republicans could use such arguments, too. Representative John Swanwick, of Pennsylvania, quoted the *Federalist* as stating that a Member of the House should have knowledge of foreign affairs since decisions in that field would sometimes be the object of legislative sanction and cooperation. These papers further stated that no branch of the Government should possess an overruling influence over the others in administration of their respective powers.[42]

The Federalists' artillery of arguments included an appeal to the "Great Compromise" of the Constitutional Convention under which the small States had been induced to accept the Constitution. Benjamin Bourn, of Rhode Island, professed himself much concerned over the claim that the House shared the treaty power. Under the Articles of Confederation, his State had had an equal vote in making treaties; he thought this right had been fully preserved under the Constitution by vesting the treaty power in the President and Senate—the latter representing the sovereignty of the States and giving his State equal representation with every other. He claimed that this was not only the understanding in Rhode Island, but in other States as well, including Massachusetts and Virginia.[43]

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[39] For examples, see *ibid.*, Mar. 7, 1796, pp. 425–430; Mar. 18, 1796, pp. 626–627. See also *ibid.*, Mar. 9, 1796, p. 460. Livingston stated he did not rule out impeachment as an object—it was impossible to determine that question until the papers were seen; see *ibid.*, Mar. 18, 1796, p. 629. However, the resolution calling for the papers did not state impeachment as an object. Indeed, the House majority claimed that no purpose needed to be stated in a call for papers.

[40] *Ibid.*, Mar. 10, 1796, p. 478.

[41] *Ibid.*, Mar. 10, 1796, pp. 497–498; Mar. 11, 1796, pp. 503, 524–526.

[42] *Federalist*, Nos. 48 and 75.

In spite of the historical accuracy of Bourn's contention, Gallatin claimed that the argument was meaningless and only calculated to revive prejudice and animosity. The power to make laws was as complete an expression of sovereignty as the treaty power, yet the former was located in Congress as a whole.[44] Virginia members, representing as they did the State most underrepresented in the Senate, reopened the entire question of the distribution of powers between Senate and House. Andrew Moore argued that the small States in obtaining equality of membership in the Senate had been given all they could legitimately claim, without assigning to that body great additional powers such as authority over treaties. Page argued that such extra powers should not be assigned the Senate at the expense of the House, since the latter through proportional legislation must defend the larger States.[45]

Besides these more or less theoretical, constitutional arguments, there were others of a more immediate, practical, or partisan nature.

The memory of the Senate's pretensions to superior status still rankling in their minds, Republicans claimed that their Federalist colleagues, working hand in glove with the Federalists of the upper Chamber, were party to a plot to diminish the power of the more popular House by depriving it of an important constitutional power. Furthermore, the Federalists, actuated by party spirit, devotion to monarchic England, and hatred for Republican France, were trying to force on the House a treaty unduly friendly to the former and harmful to the latter. The Federalists, on the other hand, with the tyranny of the French Revolutionists ever before them, claimed that it was the House that was motivated by pride, petulance over being overruled in its nonintercourse scheme, and by a desire to usurp the powers of the Senate and the Executive and concentrate all authority in itself. The unrelenting opposition of the Republicans to the treaty, said they, was further caused by an intense pro-French, anti-British feeling which would oppose *any* treaty with Great Britain. Cried Fisher Ames, "If a treaty left King George his island, it would not answer, not if he stipulated to pay rent for it." [46]

An argument which inflamed minds on both sides of the controversy was the Federalist claim that failure to put the Jay Treaty into effect would mean war with Great Britain by bringing about renewed British depradations and American reprisals, as well as the necessity of using force to acquire the western posts. This put the Senate on the side of peace gained through use of the treaty power. Their opponents minimized the danger of war and placed their faith in commercial retaliation, which put the House on the side of defense of American interests through use of the legislative power.[47]

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[43] *Annals*, 4th Cong., 1st sess., Mar. 15, 1796, pp. 566-568. For a discussion of this point in the constitutional and ratifying conventions, see ch. II, *supra*.

[44] *Ibid.*, Mar. 23, 1796, p. 737.

[45] *Ibid.*, Mar. 15, 1796, p. 558; Apr. 21, 1796, pp. 1121–1122.

[46] *Ibid.*, Apr. 22, 1796, p. 1164; Apr. 27, 1796, pp. 1212–1213; Apr. 28, 1796, pp. 1247–1248.

Finally, the Federalists claimed that if the House would not perform its plain duty and appropriate the necessary funds to put a constitutionally adopted treaty into effect, the Union would be at an end. The theory was that the Union would only hold together as each branch of the Government performed the duties required of it by the Constitution. It will be recalled that in connection with the Algerine Treaty, President Washington had expressed this same sentiment. The Republicans professed to see in this argument a threat by the Senate Federalists and their cohorts in the House deliberately to sabotage the existing system if they did not have their way.[48]

In spite of the heat engendered by all these arguments, it should not be forgotten that the one paramount issue was the Jay Treaty itself. Should it, or should it not, be put into effect? The answer to this question depended, in turn, upon many economic, sectional, and social factors which cannot be discussed here. The Senate by a two-thirds vote had put itself squarely behind the treaty. What should the House do?

The constitutional House versus Senate issue was more clear cut in the vote on the resolution calling on the President to furnish the papers than on the appropriation issue itself, since many Members who were inclined to support the treaty on its own merits felt that the House had a constitutional right to pass upon the question of putting it into effect. Thus the former resolution was adopted by the respectable majority of 62 to 37.[49] However, from a practical standpoint, the position of the House was relatively weak; Washington refused to furnish the papers and there was little the House could do about it except adopt further resolutions defining what it claimed were its rights.

The President's reasons for rejecting the call for papers were four:

(1) Foreign negotiations require caution, often secrecy. Necessity for such caution and secrecy was a cogent reason for giving the treaty power to the President and Senate, the latter being a comparatively small body.

(2) The papers did not involve any purpose under the cognizance of the House, except impeachment, which the resolution did not cite as a purpose of the call. That treaties were fully completed when approved by the President and Senate had been the practice thus far, and had been so understood by foreign powers and acquiesced in by the House itself.

(3) The treaty power had been confined to the Senate as part of the "Great Compromise" of the Constitutional Convention in the interest of the smaller States.

(4) The Convention had explicitly rejected a proposal to make treaties binding only after being ratified by law.[50]

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[47] *Ibid.*, Apr. 19, 1796, p. 1067; Apr. 20, 1796, pp. 1097–1098; Apr. 28, 1796, p. 1260.

[48] Fisher Ames closed his famous speech by prophesying that if the House should reject provision for the treaty, he, broken in body though he was, might outlive the Government and Constitution of his country. See *ibid.*, Apr. 26, 1796, p. 1263.

[49] *Ibid.*, Mar. 24, 1796, pp. 759–760.

[50] *Ibid.*, Mar. 25, 1796, pp. 760–762.

It could hardly be expected that the President's reply, which put Washington squarely in the camp of the Federalist minority in the House, would be acceptable to that body. It was not. Receipt of the message provoked a new debate and adoption by identical 57 to 35 votes of the two so-called "Blount Resolutions," which stated (1) that although the House did not claim an agency in making treaties, when a treaty stipulated regulations on any subject submitted by the Constitution to Congress as a whole, execution of such stipulations must depend on legislative action by both Houses, and (2) that in applying to the President for papers, it was not necessary for the House to state its reasons.[51]

Although this was of necessity only a statement of position—the House having no practicable way of forcing the President to furnish the papers—the lower Chamber was far less helpless when it came to making or withholding financial provision for putting the treaty into effect. This was the all-important practical issue at hand.

Theodore Sedgwick opened this, the critical stage of the controversy, on April 13, 1796, when he moved that provision ought to be made by law for carrying into effect four recently ratified treaties—with Algiers, the Indian tribes northwest of the Ohio, Spain, and Great Britain. The obvious purpose, of course, was to link the Jay Treaty with the highly popular Pinckney Treaty with Spain. James Hillhouse, Federalist stalwart from Connecticut, announced that if provision for one of them were rejected, Federalists would feel justified in voting against provision for the others. Gallatin immediately punctured that bubble, however, by pointing out the obvious inconsistency between this strategy and the very basis of the Federalist position—the claim that the House was morally obligated to put all constitutionally adopted treaties into effect. The Republican majority thereupon quickly approved funds for the Indian, Spanish, and Algerine treaties, and the debate on the question of putting the Jay Treaty into effect was on again. The climax came on April 28, 1796, when Fisher Ames pulled his pain-racked body erect and delivered the address in favor of the treaty which was for decades remembered as the epitome of congressional eloquence—an address which moved to tears even two such old campaigners as Vice President Adams and Supreme Court Justice James Iredell, who sat in the crowded gallery.[52] Ames based his arguments both on the merits of the treaty itself and on the constitutional duty of the House. Two days later the House by the narrow vote of 51 to 48 voted to approve the appropriation.[53]

In spite of the sound and fury accompanying this "great debate," the final vote in a sense solved no question except that of approving appropriations for this one treaty. In the votes on the call for papers, on the resolutions answering the President's message refusing to furnish them, and on the Jay Treaty appropriation, the stand of the House majority was perfectly consistent. Its Members had claimed that when a treaty approved by the President and Senate required legislative action to put it into operation, the House had a constitutional right to weigh the treaty on its merits and pass, or refuse to pass, the necessary legislation as it saw fit. They had then weighed the Jay Treaty on its merits and had decided to vote the necessary funds. Among the 51 affirmative votes were those of many who claimed that the House had a perfect right to withhold the funds if it saw fit. Thus from the standpoint of constitutional theory, the vote was not a clear-cut victory for the exclusion of the House from the treaty power. The Constitution itself, by grant of powers mutually contradictory, had created the possibility of an impasse, and the theoretical powers of the House in this area were not then determined, nor have they been to this day.

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[51] *Ibid.*, Apr. 7, 1796, pp. 771–772.

[52] Letter, Adams to his wife, Apr. 30, 1796, Charles Francis Adams (ed.), *Letters of John Adams Addressed to His Wife* (Boston: Charles C. Little & James Brown, 1841), II, 227.

[53] *Annals*, 4th Cong., 1st sess., Apr. 28, 1796, pp. 1240–1263; Apr. 30, 1796, p. 1291.

However, from the standpoint of practical accomplishment, the Senate won a great victory. One of its most highly prized prerogatives—a prerogative which goes far to make the Senate the most powerful upper Chamber in the world today—had been challenged on an issue of the most critical importance by the best brains and most persuasive eloquence of the lower House, and yet had come through unscathed. And the precedent was a lasting one. While the great moral question remains undecided as to how far the House is bound in good faith to carry out by legislation and appropriations the provisions of treaties, the House has never yet failed to support a treaty pledging the good faith of the United States.[54] On the other hand, if the House had successfully utilized this occasion to put into practical application its claim to pass upon treaties involving areas in which the lower Chamber had legislative power, the precedent would have been in the direction of nullifying the Senate's special treaty power, since most treaties would involve in some way at least one such area of legislation.

How the Senate would have struck back had the House refused the Jay Treaty appropriation is a question open to conjecture, but the state of mind of the Federalists was such that their Senate majority would have hit back hard. Among the maneuvers considered were:

(1) Adding the Jay Treaty appropriation as an amendment to the bill providing funds for the three other pending treaties, including the Pinckney Treaty—which was popular everywhere but especially so in the South where Republican strength was greatest—and refusing to approve provision for these treaties unless funds for the British treaty were included as well. As pointed out previously, this was a step which House Federalists could not consistently take since one of their strongest arguments was the claim that the House was duty-bound to approve without question appropriations for all treaties constitutionally adopted. However, there was no inconsistency in the upper Chamber holding the other treaties as hostages pending approval of the Jay Treaty appropriation.

(2) Holding up all legislation pending before the Senate until the House passed the desired appropriation. In the words of Chauncey Goodrich, staunch Federalist House Member from Connecticut:

> I am not warranted to assert, but I trust they [the Senators] also will arrest the federal city loan bill, land office, perhaps appropriation for the army, refuse to rise; in short, arrest the whole government, and let the people decide. The exigency of the case only can justify such perilous steps, but what can be done if the House of Representatives will not execute the government?[55]

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[54] Charles Henry Butler, *Treaty-Making Power of the United States* (New York: Banks Law Publishing Co., 1902), I, 431 (sec. 298). This statement, made in 1902, still holds true.

[55] Letter Goodrich to Oliver Wolcott, Sr., Apr. 23, 1796, Gibbs, *op. cit.*, I, 331.

(3) As intimated by Goodrich, consent to no adjournment until the appropriation was made or the House Members' terms expired.[56]

With respect to the first possibility, it is true that the Senate did not pass the bills providing funds for the Spanish, Indian, and Algerine Treaties until May 4, 1796, 4 days after the House approved the Jay Treaty appropriation in principle and just 1 day after that appropriation bill actually passed the House.[57] This could hardly have been coincidental. However, it is impossible to say whether or not the Senate would have gone through with a plan to use these treaties as hostages to coerce House action on the Jay Treaty. Federalist leaders certainly seriously considered the maneuver; even so responsible a Federalist leader as Rufus King favored it. However, Alexander Hamilton was extremely lukewarm toward the idea. He definitely opposed the maneuver by Federalist friends in the lower House as "altogether wrong & impolitic" on the theory that two wrongs do not make a right. With respect to the course of action in the upper house, he recommended:

> that the freest course should be given to the other Treaties; or at most, if a *feint* of opposition is deemed advisable, it ought to be left to the Senate by postponement &c. But even this is very delicate and very questionable.[58]

In view of Hamilton's reluctant attitude and possible opposition, it is doubtful if the Federalists' Senate majority would have remained intact on such a move.

With respect to the second alternative, Jefferson's gossipy *Anas* quoted Henry Tazewell, Republican Senator from Virginia, as stating that at the time the Jay Treaty appropriation was before the House, the latter had, on the floor of the Senate, called on various committees to report the bills in their hands, for the want of which the Senate was idle. According to Jefferson's report, Rufus King, who had been especially appealed to, replied that it was true that the committees were keeping back their reports awaiting House action on the treaty since, if the appropriation were not made, the Federalists considered legislation at an end and they may as well break up and consider the Union dissolved. Furthermore, the next day Senator George Cabot of Massachusetts expressed the same sentiments in even stronger terms, declaring a determination on the Federalist side "to break up and dissolve the Government" if provision for the Jay Treaty were not made. Tazewell was reported as stating that Cabot's manner was so awkward as to indicate that his remarks were not extemporaneous but the result of an agreement among the Federalists. Jefferson's notes, which were made 2 years after the event, quoted a Senator who actually participated in this discussion and must, therefore, be given fair weight. However, the *Anas* are so full of unsubstantiated gossip concerning alleged extreme statements by Federalist leaders that the reader is naturally reluctant to accept all such reports at face value. Moreover, the *Senate Journal* does not support the charge that the Senate was "idle" at this time as a result of failure of committees to report. Committees of which King was a member reported several bills of considerable importance during the period in question and the Senate seems to have been about as busy as usual—passing or otherwise acting upon several important measures.[59]

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[56] Letter, Hamilton to King, Apr. 15, 1796, King, *op. cit.*, II, 59–60.
[57] *Annals*, 4th Cong., 1st sess., May 3, 1796, p. 1295.
[58] Letter, Hamilton to King, Apr. 15, 1796, King, *op. cit.*, II, 59.

With respect to the third alternative—refusing to adjourn until the House passed the appropriation or the House Members' terms expired—it can only be said that such a move was under contemplation, backed by Hamilton's own recommendation. Since the Senate Federalists did not find the maneuver necessary, it is impossible to say whether or not it would have been used if needed.[60]

It is at least certain that a House failure to vote the Jay Treaty appropriation would have resulted in a very unpleasant situation between Senate and House, one that would have cast a dark shadow on the whole program of putting the Constitution into successful operation. Senator Jonathan Trumbull of Connecticut no doubt spoke for many when he wrote:

> Happy indeed has been the issue of the great question on the execution of the British treaty; much happier than it might have been, had the decision come to a contest between the two branches of the legislature. Although in that event I had no doubt of the final issue, yet the division of sentiment, and perhaps animosity which might have been produced, would have been serious in their existence, and unhappy in their consequences.[61]

An echo of the Jay Treaty controversy was heard in subsequent years when the House debated at length whether or not it had authority, through the power over appropriations, to designate where American foreign ministers could be sent. Republican efforts in this direction were aimed primarily at limiting American representation abroad on the theory that the United States should have as little intercourse with foreign powers as possible.

Such efforts, if successful, would have affected the President more than the Senate by circumscribing the former's conduct of American foreign policy. However, they would have affected the Senate to some extent since the upper Chamber through the power of confirmation shared the Chief Executive's power to appoint ministers and other representatives at foreign courts. In these debates, therefore, the Republicans championed the claim of the House to participate in conduct of foreign relations as a check on the President and Senate, while the Federalists assumed their traditional role of defending the prerogatives of President and Senate against the alleged "usurpation" of the lower House.

Republicans claimed that the lower House, as immediately representative of the people, had the right and duty to exercise its discretion in connection with such appropriations and thereby restrain the President and Senate from following a course of action in the field of foreign policy which was contrary to the public interest. If the Government should ever be shaken, declared William C. C. Claiborne of Tennessee, the attack would come from a combination of President and Senate against the popular branch. Although he did not lack confidence in President Adams, the time could come when a bold, intriguing, ambitious man would work himself into the Presidency and two-thirds of the Senate would be found wicked enough to favor his plans. The duty of the House, then, was perfectly clear. John Nichols of Virginia in 1797 moved to eliminate an appropriation for support of the American Minister at Berlin and in 1798 moved to reduce the appropriation for the American Ministries at Berlin, Lisbon, and Madrid. He claimed that it had been admitted on all sides in the very First Congress under the Constitution that the House had the right to specify and limit salaries of foreign ministers and consuls, and had refrained from doing so merely because of lack of information as to the places to which they should be sent and the amounts necessary to cover their expenses.[62]

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[59] *Senate Journal*, 4th Cong., 1st sess., Apr. 7–8, 1796, pp. 153–154; Apr. 13, 1796, p. 166; Apr. 15, 1796, p. 173; Apr. 20–22, 1796, pp. 178–181; Apr. 26, 1796, p. 186; Apr. 27, 1796, p. 187.

[60] Joseph Charles concluded that the House finally decided to approve the Jay Treaty appropriation because of the threat that the Senate would not ratify the Pinckney Treaty and because of the talk about breaking up the Union. He quoted several significant letters. See Charles, *op. cit.*, pp. 112–113.

[61] Letter, Trumbull to Oliver Wolcott, Sr., May 6, 1796, Gibbs, *op. cit.*, I, 337.

Federalists, on the contrary, claimed that control over foreign policy was wholly within the prerogatives of the President and Senate. Only the President could properly determine where diplomatic officers should be sent, and only the President and Senate could legally determine whether the diplomatic offices were properly filled. If the President sent a Minister to Berlin, the House was just as bound to appropriate for his expenses as to provide salaries for the President or Federal judges. The only power of the House in this connection was to fix the amount of the salary, guided by a sense of discretion, duty, the nature of the office, and the circumstances of the country and the public service. The Federalists painted a dark picture of a House effort to assume full control over the Government—first the Presidency would be demolished, and then the Senate, deprived of the President's support, would be speedily overthrown. The House would then be supreme and an American version of the French Convention would come into view, with consequent bloodshed, banishments, and other forms of tyranny. Moreover, the Republicans' attempt to control appointments through the power of the purse violated a solemn compact between the large and small States at the Constitutional Convention, where it was agreed that the small States were to have equal representation in the Senate in which was lodged power over appointments and treaties.[63]

It will be seen that the arguments on both sides closely paralleled those of the debate on the appropriation for the Jay Treaty, except that here the power of the President and Senate over Federal appointments was involved rather than the power to make treaties. The result was the same—the House declined to exercise the power claimed in its behalf by the Republicans. The representatives on July 3, 1797, without a record vote, and on March 5, 1798, by a vote of 52 to 48, decided to include the full amount necessary to effectuate the policy of the President.[64]

ASSAULT BY AMENDMENT

The Senate's stand in favor of the unpopular Jay Treaty not only resulted in bludgeon verbal blows from embittered treaty foes on the upper Chamber as an institution, and in the House effort to grasp from the Senate a share of the treaty power, but also in vigorous efforts in various parts of the country in behalf of constitutional amendments to reduce the Senate's powers and independence. It was a critical time in the history of the Chamber which was to become the most powerful upper house in the world.

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[62] *Annals*, 5th Cong., 1st sess., July 3. 1797; *ibid.*, 5th Cong., 2d sess., Jan. 17, 1798, p. 852; *ibid.*, 5th Cong., 2d sess., Mar. 5, 1798, p. 1211.

[63] *Annals*, 5th Cong., 1st sess., July 3, 1797, pp. 435–438; *ibid.*, 5th Cong., 2d sess., Jan. 22, 1798; Feb. 27, 1798, p. 1092; Mar. 2, 1798, pp. 1166, 1182–1183.

[64] *Ibid.*, 5th Cong., 1st sess., July 3, 1797, p. 440; *ibid.*, 5th Cong., 2d sess., Mar. 5, 1798, p. 1233.

Constitutional amendments to clip the wings of the Senate were frequently and seriously discussed at antitreaty gatherings in many parts of the country. For instance, a grand jury at Burke, Ga., adopted a presentment declaring that treaties ought to be discussed and approved under the same legislative forms required for other laws. The Kentucky House of Representatives considered "reasonable" a petition by sundry citizens of Scott County recommending reduction of the Senators' 6-year terms. A public meeting of citizens of Bordenton, Crosswicks, Black Horse, and Rocklesstown, N.J., resolved that the Constitution be speedily amended to provide that two-thirds of the House as well as the Senate approve treaties and that Senate doors be always open to the public except during war or other extraordinary occasions—so that 20 Senators could not, either through pride, ignorance, vanity, or corruption, sacrifice the interests, honor, and the very existence of the United States.[65]

The most vigorous efforts in this direction were taken by the Virginia Assembly. There, antitreaty forces, in full control of both Houses, pushed through, by overwhelming majorities, the following resolution:

> Resolved, that the Senators representing this State in the Congress of the United States be, and they are hereby, instructed and the Representatives requested, to unite their utmost exertions to obtain in their respective houses the following amendments to the Constitution, viz:
>
> 1. That no Treaty, containing any stipulation upon the subject of the powers vested in the Congress by the eighth section of the first article, shall become the supreme law of the land, until it shall have been approved, in those particulars, by a majority of the House of Representatives; and that the President, before he shall ratify such treaty, shall submit the same to the House of Representatives.
> 2. That a tribunal other than the Senate be instituted for the trial of impeachments.
> 3. That the Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for three years * * *.
> 4. That no person holding the office of a judge under the United States shall be capable of holding, at the same time, any other office or appointment whatever.[66]

As was the case later in connection with the Kentucky and Virginia resolutions, the proposals were sent to the other State legislatures for their concurrence, giving treaty opponents a concrete issue on which to express their disapproval of the U.S. Senate.

The resolution struck some responsive chords among members of State legislatures. In Massachusetts, for instance, one member claimed that many people believed the Senate had intruded on the lower House and the equilibrium of power in the National Government had been frustrated. Another pointed out that the existing system presented the danger of a clash between the President and Senate on the one side and the House on the other.[67]

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[65] *Aurora*, Aug. 15, 1795; Oct. 19, 1795; December 1795; Mar. 1, 1796.

[66] *Aurora*, Dec. 22 and 26, 1795. The first item in the resolution, designed to give the House a share in the treaty power, was embarrassing to treaty opponents in the National House of Representatives, since they claimed the lower Chamber already had this power.

The Virginia Assembly defeated a resolution expressing undiminished confidence in President Washington. See McMaster, *op. cit.*, II, 256.

It will be recalled that Virginia proposed certain amendments limiting the Senate's treaty power at the time she ratified the Constitution. These amendments were offered in the Senate and defeated in 1789. See *Senate Journal*, 1st Cong., 1st sess., Sept. 8, 1789, p. 125.

In Pennsylvania, the legislature staged a full-dress debate on the resolution in which the pent-up resentment against the Senate was fully aired.

What preeminence of virtue, asked Dr. Leib of the State's lower house, resided in the President and 11 Senators (two-thirds of a quorum) to justify giving them power to bind all the people and their posterity? Under the existing arrangement, the President and Senate could legislate in all cases to which treaties could possibly extend and thus the power of the House was annihilated. The Senate should not have exclusive authority over approval of treaties because its small size made it easier to manipulate through influence or corruption and private ambition had wider play. Exclusion of the House destroyed the checks-and-balance system, since treaties were the most important of all laws. Six-year terms were too long—if people could not be entrusted with frequent elections, a strong argument existed for a septennial House of Represenatives, a hereditary Senate, even divine right of kings. Turning on the Senate's impeachment power, he denounced the existing constitutional arrangement as a "farce," since it made senatorial "accomplices" judges of wrongdoers brought before its bar for trial.

In the same debate, William Maclay—who as a Member of the first U.S. Senate had drawn the 2-year term and had failed of reelection—also claimed that the 6-year term was too long for a republic. Giving the smaller States equal representation in the Senate also violated republican principles, but here the Constitution—as if conscious of untenable ground—had set up double ramparts. To shorten the terms of service would fall far short of the calls of true republicanism but should not be rejected on that score.[68]

In spite of the aggressive tactics of the treaty's and Senate's foes, the Virginia resolution was everywhere rejected. Arguments in favor of the existing arrangement were many and multiform, ranging from vindication of the Senate's place in the whole constitutional structure to defense of the treaty itself.

The Rhode Island Legislature adopted resolutions declaring that the President in ratifying, and the Senate in approving, the Jay Treaty were "actuated by one common motive, a regard for the peace and prosperity of their country," and subsequently sent a reply to the Virginia Legislature mildly remarking that the Constitution had not yet been sufficiently tried to justify amendments at that time. The same argument was heard in the New York Assembly. Other New York defenders of the Senate's powers went further and claimed that foreign nations would have no confidence in treaties subject to the caprice of so unwieldy a body as the House of Representatives, "in which was not centered the abilities of the United States."[69]

In an elaborate defense of the existing constitutional arrangement, Cadwalader Evans of the Pennsylvania House of Representatives attacked each of the Virginia proposals. Six-year Senate terms were necessary to put the Senate out of reach of undue influence and popular passion and to enable Senators to prepare for their complex duties. Virginia's own State senators, he pointed out, were elected for *four* years and yet their duties were less difficult than those of United States Senators, the terms of which the Virginians wished to reduce to 3 years. With respect to impeachments, what body or what individual would be more unbiased than the Senate? Not a court of law—the President would have influence over the judges, since he appointed them. If the power were given to a jury or a single individual, who would make the appointments?

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[67] *Aurora*, Feb. 22, 1796, quoting debate in Massachusetts House of Representatives, Feb. 5, 1796.

[68] Action on the Virginia resolution in the New York, Rhode Island, Massachusetts, and Pennsylvania Legislatures is recorded in *Aurora*, Feb. 1, 2, 3, 16, 22, 26, 27, 29, 1796, and Mar. 2, 1796. See also letter from Representative Uriah Tracy, of Connecticut, to Oliver Wolcott, Feb. 10, 1796, Gibbs, *op. cit.*, I, 299, and letter, Representative Chauncey Goodrich to Oliver Wolcott, Feb. 17, 1796, *ibid.*, I, 302.

[69] *Aurora*, Feb. 1, 16, 27, 1796.

Coming to the heart of the constitutional issue, Evans pointed out that the Virginia resolution struck at the very core of the "Great Compromise" of the Constitutional Convention, the small States having been induced to accept the Constitution on the basis of equal representation in a Senate possessing, among other powers, the right to pass on treaties. He then pointed out the dilemma of the "States'-rights" school—to impair the treatymaking rights of the house representing the States equally would be "drawing the system nearer a consolidation," exactly what the Virginians claimed to fear most.

The upshot of the Harrisburg debate was that the Pennsylvania House of Representatives by a 45-to-30 vote adopted a substitute stating that it was unnecessary and improper for the legislature to take action along the line proposed by Virginia, and by a 42-to-32 vote approved a preamble stating that the people were happy with the Constitution as it then stood. The State senate went even further: it almost unanimously rejected the Virginia resolution and then struck back at the Virginians by offering other matters which might more properly be the subjects of constitutional amendments—making land responsible for debts, freeing Negroes, or not considering them in apportioning the seats in the United States House of Representatives.

In spite of the fact that the Virginia proposals were everywhere disapproved, it will be noted that in a State like Pennsylvania, which had a healthy two-party system, the effort to prune the United States Senate's powers received considerable support in the more popularly elected House. Even in a Federalist stronghold like Massachusetts there was an energetic defense of the Virginia resolution, many of the legislators strongly objecting to the steamroller tactics of the majority in refusing even to appoint a committee to consider the proposals of a friendly sister State. On the other hand, some State legislators, who might otherwise have expressed disapproval of the Senate and of the treaty, no doubt agreed with their Federalist opponents that a State legislature was not an appropriate place to express such disapprobation.[70]

The context of the debates in the various States shows that opposition to the Jay Treaty was the paramount issue. This, in turn, was the touchstone of the alinement between Federalism and Republicanism. A New York correspondent in the *Columbian Centinel* of Boston put the issue squarely:

> The Assembly of this State have, by a very great majority, decided against the Virginia amendments. They have been considered as the rallying point of declining antifederalism, and have been avoided accordingly. Your legislature

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[70] *Ibid.*, Feb. 3, 1796; *Columbian Centinel* (Boston), Feb. 6, 1796.

> [Massachusetts'], I am happy to see, have accorded with ours. Accounts from every part of the Union, are highly favorable to federalism, good order, peace, and happiness.[71]

The situation was further complicated by the fact that many interpreted the Virginia resolution as a reflection on the great Washington. The President's admirers everywhere leaped to his defense. The Delaware Legislature, for instance, resolved that it could not view with indifference attempts to alienate from the President the much-deserved esteem of his fellow citizens and expressed its "entire approbation" of his conduct. It then further resolved that Delaware's Senators, who had voted for the treaty, had also merited their fellow citizens' approval by a faithful discharge of their duty.[72]

Approval by the U.S. House of Representatives of the bill appropriating funds to put the Jay Treaty into effect was followed by a sudden and sharp decline in public discussion not only of the treaty but also of the place the Senate ought to hold in the American political system.

However, in subsequent years continued rumblings against the U.S. Senate were heard, especially from the direction of the southern agrarian element. In 1798, Jefferson wrote to Madison condemning election of Senators by the legislatures and recommending transfer of impeachment trials to some other court.[73] In the same year, John Taylor of Caroline, himself an ex-Senator, suggested, among other constitutional changes, an amendment to provide more frequent rotation in office.[74] Referring to the Senate, Madison in January 1801 remarked that:

> The public is already sore and jealous of that body, and particularly so of the insidious and mischievous policy of the British Treaty.[75]

Later in the same year, Jefferson's close friend, Edmund Pendleton of Virginia—possibly in collaboration with Jefferson and John Taylor of Caroline[76]—published a pamphlet entitled *The Danger Not Over* in which he set forth firmly and lucidly the credo of the Virginia agrarian leaders. This manifesto attracted considerable notice during the following years since it constituted a major part of the political scripture of Thomas Ritchie, for many years editor of the *Richmond Enquirer*.[77] The main themes of Pendleton's program were reduction of the powers of the President, enhancement of the powers of the House of Representatives, more explicit limits on the powers of the Federal Government, and—more pertinent to the present study—curtailment of the powers of the Senate. Among his recommendations to accomplish the latter objective were: depriving the Senators of all executive powers; shortening their terms of service and subjecting them to recall in order to make them more amenable to the State legislatures; and making all treaties involving peace and war, expenditure of public money, or commercial regulations (which would have included practically all treaties) subject to the approval of both

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[71] *Columbian Centinel*, Feb. 17, 1796.

[72] *Ibid.*, Feb. 3, 1796.

[73] Jefferson to Madison, Jan. 25, 1798, Lipscomb, *op. cit.*, IX, 436.

[74] Letter, Taylor to Jefferson, June 25, 1798, "Papers of Thomas Jefferson," Library of Congress Microfilm, No. 35.

[75] Letter, Madison to Jefferson, Jan. 10, 1801, Hunt, *Writings of Madison*, VI, 413.

[76] This is the conclusion of Taylor's biographer, Henry H. Simms; see his *Life of John Taylor* (Richmond: William Byrd Press, 1932), p. 100.

[77] John David Mays, *Edmund Pendleton, 1721–1803* (Cambridge: Harvard University Press, 1952), II, 334.

Houses. Such changes were designed to prevent the Senate from becoming, in Pendleton's words, a "dangerous aristocracy."[78]

It will be recalled that in the Constitutional Convention and in the subsequent ratification campaign, the Senate was pictured as filling the double role of defender of State sovereignty and bulwark of conservatism to restrain a more excitable lower House. In the Jay Treaty crisis the Senate performed the latter function—by approving an unpopular treaty the upper Chamber checked a more agitated House demanding reprisals which might have led to war with Great Britain. Disliking the Senate's stand on that issue, the Virginians and their allies wished to curtail the upper Chamber's powers.

Pendleton and his associates offered this program even after Jefferson had been elected President. They believed that true republicanism might again fall before "monarchic" Federalism and then these added safeguards would again be needed. In attempting to reduce Senate terms and providing for recall of Senators, they were true to the concept of the upper Chamber as representatives of State sovereignty. But, contemplating their current strength in the House—19 out of 106 Members—the Virginians in attempting to reduce the Senate's powers were quite oblivious of the upper Chamber's dormant but highly potent future ability to defend southern interests in the face of a House of Representatives about to reflect the increasing numerical preponderance of the North.

However, the Senate even at this moment was about to come under Republican control. When that happened, the Jeffersonians naturally began to lose their dread of the upper Chamber. Minus coronets and purple, the Senate could adjust itself nicely to the new Republican era.

The Senate Survives the Jay Treaty

These developments do not fully explain why the Senate survived the attacks leveled against it during the critical years between its approval of the offensive Jay Treaty and the downfall of the Federalists.

By 1795 the popularity of the Senate was already at a low ebb. Even before the upper House had held its first session, many people feared its power. Then in its first year it had made a bad start by alienating the public through lofty claims to superiority over both the lower House and public opinion. Its policy of closed doors, maintained until December 1795 (and after that during executive sessions), had aroused widespread suspicion. The French Revolution, championed by a large and articulate segment of the American people, had accentuated opposition to all aristocratic pretensions and raised serious questions about giving great powers to upper Chambers. And then in 1795, on an issue considered so vital that it divided the citizenry into two ugly-tempered camps, the Senate had taken the unpopular side—a side which identified it with the country's enemy in the late Revolution. Small wonder that the Senate was shaken in a storm of popular disapproval.

No single answer can explain how it was that the Senate survived the ordeal with unimpaired powers.

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[78] Robert Leroy Hilldrop, *Life and Times of Edmund Pendleton* (Chapel Hill: University of North Carolina Press, 1939), pp. 320–323; Mays, *op. cit.*, II, 334 ff.

Part of the explanation lies in the fact that the first emotional, unreasoning animosity toward the treaty gradually spent itself, and the general public, although probably never actually favoring the treaty, accepted it as a lesser evil than war with Great Britain. Toward this change in public sentiment Federalist leaders in the Senate, working in cooperation with Alexander Hamilton, contributed a substantial part. Senators George Cabot in Massachusetts, Oliver Ellsworth in Connecticut, and Rufus King in New York were especially active in cultivating public opinion favorable to the treaty. They arranged to have articles favorable to the treaty published in various newspapers, in private conversations convinced business leaders of the treaty's merits, induced chambers of commerce and other groups to pass favorable resolutions, promoted circulation of pro-treaty petitions, and encouraged the treaty's friends in the lower House. Senator Cabot even attended Harvard's commencement ceremonies "to ascertain the state of public opinion & to contribute my mite toward forming it rightly." King collaborated with Hamilton in writing the "Camillus" papers, which even the treaty's enemies admitted were the most effective articles in its favor. These efforts by Federalist Senators suffered from the common Federalist weakness of excessive concern with influencing the opinion of the "good people" rather than the public as a whole. Nevertheless they did succeed in mobilizing the politically influential conservative element in favor of the treaty, as well as publicizing its actual provisions and thereby dissipating some of the opposition based merely on exaggerated, hearsay reports of the treaty's provisions.[79]

The more tolerant attitude toward the treaty resulting from these efforts was naturally reflected in a more friendly attitude toward the Senate, which had previously been accused of sacrificing the country's dearest interests in approving it. In the meantime, the Senate's approval of the highly popular Pinckney Treaty compensated for some of the bitterness excited by the unfavorable terms of the treaty with Great Britain.

A further explanation for the Senate's success in overcoming this, its severest ordeal, lies in the fact that President Washington approved the treaty. Despite abuse by the antitreaty press and strident calls for his impeachment, the great mass of people remained convinced that the President would do nothing to injure his country. If the illustrious Washington approved the treaty, the Senate must have been right in doing likewise.

Furthermore, it became less and less possible for the Republicans to single out the Senate as the center and source of all unpopular political activities. The upper Chamber opened its legislative sessions to the public, and the old fears of dark plots hatched behind closed doors were gradually dissipated. After the House approved the appropriation to put the Jay Treaty into effect, the lower Chamber assumed some of the responsibility for the treaty—particularly in the eyes of those who believed the House had discretion in the matter. On the other hand, the antitreaty forces derived considerable satisfaction from the full-dress discussion of the treaty power in the

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[79] See King, *op. cit.*, II, 16–62, for the correspondence of Rufus King, George Cabot, James Gunn, Alexander Hamilton, Christopher Gore, John Marshall, Theodore Sedgwick, John Jay, and Fisher Ames in behalf of the treaty. See also letter, Oliver Ellsworth to Oliver Wolcott, Aug. 20, 1795, Gibbs, *op. cit.*, I, 226.

House in 1796 and from the lower Chamber's show of independence in defending what it considered its constitutional powers. The Republican *National Intelligencer* spoke glowingly of the "blaze of talent" accompanying the Representatives' explanation of the Constitution's true construction, and anticipated that there would no longer be any doubt but that to Congress as a whole belonged the right of sanctioning provisions of treaties which involved subjects under the jurisdiction of both Houses.[80] However wrong the editor may have been in his premises, he reflected the satisfaction many Republicans derived from their interpretation of these events.

Perhaps most important of all, the whole political climate of the Nation changed radically in the 2 years following Senate approval of the Jay Treaty. France—darling of the antitreaty, Republican elements—was now a more serious threat to the well-being of the United States than Great Britain, "patron nation" of the Federalists. Naturally the Federalist-dominated Senate profited from the change. Then when the Federalists went too far in their counterattack against the pro-French Republicans, the latter had stronger reasons than ever to link the House with the Senate as perpetrator of anti-republican mischief. Passage of the hated Alien and Sedition Acts by House as well as Senate was proof to them that the task at hand was not so much enhancement of the power of the House at the expense of the Senate but achievement of victory for their party's principles all along the line.

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[80] *National Intelligencer*, Nov. 7, 1800.

CHAPTER X

THE SENATE AS DEFENDER OF STATE SOVEREIGNTY

During that tense 1787 Philadelphia summer, the delegates to the Constitutional Convention, desperately anxious to forge a compromise acceptable to both centralizers and decentralizers, devised an upper Chamber designed to represent and defend that portion of sovereignty remaining in the individual States. Election of Senators by State legislatures was generally considered a natural corollary of that role.

As pointed out in chapter II, this role was partially vitiated by decisions to the effect that Senators were to vote *per capita* rather than by States, were to be paid out of the Federal Treasury, and were to be elected for the comparatively long term of 6 years without right of recall by the legislatures. Also, the idea of the Senate as a conservative council of elders to advise the President tended to encroach on the former role. However, the Senate's function of representative of State sovereignty was so forcefully stressed by both friend and foe during the ensuing ratification campaign that the concept came to be widely accepted by the time the new Government went into operation in 1789.

A word of caution may be in order at this point. By the concept "representative of the States" the men involved in the 1787–88 struggle meant something more than merely defender of the small States against encroachment or even possible engulfment by the larger States, although this idea was, of course, the prominent one in arranging the terms of the "Great Compromise." It is true, as William Smith White pointed out, that the Senate "came upon the scene to check Bigness, a Big Federal Government, the Big States, the Big Parties—and even the Big Majority."[1] However, it should not be ignored that the men of 1787–88 had in mind something more than this. They saw (or at least professed to see) in the Senate a "council of States"—a body that would speak for the States as political entities, defend their interests as such, and serve as a vital connecting link between the State legislatures and the Federal Government.[2]

These men saw in the Senate a body somewhat similar to the one established in Germany 80 years later. It will be recalled that the members of the Bundesrat did actually speak for the *governments* of the component states of the German Empire and did serve as a link between them and the imperial government.[3]

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[1] William S. White, *op. cit.*, p. 15.

[2] *The Federalist*, No. 62.

[3] The potentially powerful Bundesrat might have become the pivot of a more decentralized German Empire had not the Emperor and Chancellor dominated it through the large block of Prussian votes, and had not the Reichstag—popularly elected, holding public sessions, and reflecting more vitally the political interests of the people—overshadowed the upper chamber with its secret sessions and comparatively unknown members. See John A. Hawgood, *Modern Constitutions Since 1787* (New York: D. Van Nostrand Co., 1939), pp. 244–245.

If the Senate actually had established itself as defender of State sovereignty during the crucial years under study, a powerful centrifugal factor would have been incorporated into the Federal Government from the very start, with unknown but undoubtedly profound effect on the political development of the Nation. However, the precedents of those critical years did not incorporate that Senate role into the practical, working arrangements of the new Government.[4]

AMBASSADORS OF THE STATES

It was not that the concept of the Senate as a bulwark of State sovereignty was soon forgotten. Among the Members who gathered in New York for the first session of the First Congress in 1789 were some who feared the consolidating effect of the new Government and who came prepared to espouse the Senate as protector of the State governments against attack from both President and House of Representatives.

An opportunity to defend the Senate's powers was soon forthcoming. When the House sent up a bill recognizing the President's power to remove, without Senate sanction, officials whose appointments had been confirmed by the Senate, some Members—particularly Maclay of Pennsylvania and Grayson of Virginia—were quick to scent a deliberate plot to destroy the Senate, the States' lone defender in the National Capital. Said Grayson:

> The matter predicted by Mr. [Patrick] Henry is now coming to pass; consolidation is the object of the new Government, and the first attempt will be to destroy the Senate, as they are the representatives of the State legislatures.[5]

In the House debate on the power to remove Federal officials, John Page of Virginia had already stressed the importance of the Senate sharing the power of removal as the bulwark of the State governments against despotic Presidential power.

In the Senate vote on the question, all the Senators from the States south of the Potomac and all others who were inclined to minimize the powers of the Federal Government voted for Senate confirmation of Presidential removals as well as appointments.[6]

However, the issue was not at all clear cut. A liberal interpretation of the powers of the Senate in order to preserve its ability to defend the interests of the States was only one of several factors involved. Others included the problem of administrative responsibility and efficiency, the question of constitutional interpretation, Senate *esprit de corps*, and the balance of power between President and Congress. Given the choice of placing authority in the Executive or in the legislative branch, those who feared a powerful central government much preferred the latter, even though this increased the power of the "aristocratic" upper House. Considering as a whole the dis-

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[4] This subject was discussed by William H. Riker in "The Senate and American Federalism," *American Political Science Review*, XLIX (June 1955), pp. 452–469. Professor Riker concluded that the failure of the Senate to represent the State governments—in his opinion a crucial constitutional development—was due, first, to gradual failure of State legislatures to enforce their instructions on Senators and, second, to gradual transfer of power to elect Senators from the legislatures to the people. He devoted comparatively little attention to the period under study here.

[5] Maclay, *op. cit.*, p. 116. In another connection, Maclay claimed that President Washington deliberately courted the House so that he and the lower Chamber by their combined weight could "depress the Senate and exalt his prerogatives on the ruins." See *ibid.*, p. 122. It will be recalled that a few years later, in the furor over the Jay Treaty, Washington was accused of trying to destroy the House with the aid of the Senate.

[6] *Ibid.*, p. 116.

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cussions on this issue in both House and Senate, the concept of the Senate as the representative of State sovereignty appears as a comparatively minor consideration.[7]

The following month Congress took up the subject of amendments to the Constitution, in fulfillment of what many citizens considered a moral commitment made at the time the Constitution was ratified. This would have been the logical time for those who insisted on the Senate being the special representative of the State legislatures to bring up the amendment proposed by the New York convention to the effect that Senators could be recalled at any time by the State legislatures which elected them. It will be remembered that the Poughkeepsie convention had solemnly enjoined New York's representatives in Congress to exert all their influence in behalf of such an amendment in order to make the Senators the peculiar instruments of the legislature's will. It will also be remembered that powerful forces in Pennsylvania, speaking through the Harrisburg meeting following the State's ratifying convention, had also pressed for a recall amendment.[8]

But now when opportunity came to seek congressional approval of such an amendment, little or nothing in this direction was done by any of the Senators or Representatives from either New York or Pennsylvania. It could not be expected that Federalist stalwarts like Senators Rufus King or Philip Schuyler of New York would be very enthusiastic about offering such an amendment, but it could be at least reasonably argued that they were morally bound to do so by the terms of their State's ratification of the Constitution. However, the record does not show that such an amendment was even presented to the Senate.[9] In view of Senator Maclay's notorious opposition to Federal power, perhaps more could have been expected of him in the way of an amendment subjecting the Senate to control by the State legislatures. Yet his famous *Journal* does not show that he, either, had any interest in such an amendment. He was ill during much of the time the Senate considered constitutional amendments, but not too ill to take part in vigorous discussions with regard to location of the National Capital.

The only recorded effort to enhance the State legislatures' control over Senators was made by Representative Thomas Tucker of South Carolina, apparently acting upon instructions from the citizenry of his own State. The second of 17 amendments proposed by Tucker provided for annual election of U.S. Senators, who were to be rendered ineligible to serve more than 5 years in any period of 6 years. The House disposed of these amendments with little ado, however, refusing even to refer them to the Committee of the Whole.[10]

Yet the idea of making Senators more responsive to the State legislatures did not immediately die. The following year, Rhode Island, in finally ratifying the Constitution, enjoined the State's Senators and Representatives in Congress to exert all their influence in behalf of

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[7] *Annals,* 1st Cong., 1st sess., May 19, 1789, pp. 387–397; June 16–22, 1789, pp. 492–599, *passim;* July 22, 1789, pp. 600–608; Adams, *Works,* III, pp. 409–412 (Adams' notes on the Senate debates).

[8] See ch. II, *supra.*

[9] It should be remembered that the Senate debates were not recorded during this period and also that the *Senate Journal* and the *Annals* do not show all the details of Senate business. The *Senate Journal* did, however, record a number of constitutional amendments offered in the Senate, but no amendment providing for recall or limiting Senate terms was included.

[10] *Annals,* 1st Cong., 1st sess., Aug. 18, 1789, pp. 790–792.

21 amendments, including one providing for recall and replacement of Senators by the legislatures.[11]

The same year a committee of both houses of the Massachusetts General Court controlled by "anti-Federalists" recommended a number of amendments to the Constitution, several of which were designed to prevent a "consolidation of the States." Among them was a proposal to reinforce the legislatures' control over the Senate by giving them the right to recall members of the upper Chamber whenever they deemed it expedient and by reducing the Senate term to 4 years. Submitted near the end of the session, the amendments were postponed in the closing rush of legislative business and thus did not receive the final approval of the general court.[12]

In the meanwhile, the Senate was called upon time and time again to open its doors to the public, partly to enable the legislatures to know what transpired within the Senate's doors and thus determine how well the Senators were conforming to their will.

As mentioned in the preceding chapter, the Virginia resolutions of 1795, submitted in the heat of the Jay Treaty controversy and designed to reduce the powers of the Senate, provided for reduction of Senate terms to 3 years, while the Pendleton manifesto, published a few years later, called for shortening the Senate term and subjecting Senators to recall by the legislatures.

Federalists also contributed their mite toward keeping alive the representative-of-State-sovereignty concept by appealing to it every time the House appeared to impinge on the Senate's prerogatives by using the power of the purse to attempt to grasp a share of the treaty and appointment powers.

However, calls for making the Senate more responsive to the State legislatures could hardly be said to constitute an insistent demand for reinforcement of the Senate's role as defender of State sovereignty. In fact, it might even be argued that the comparative lack of vigor behind these calls could be interpreted as a passive expression of popular approval of the Senate's failure to act in any true sense as the representative of the States as political entities. Even in the States where the calls were heard the loudest—New York and Rhode Island—the record does not indicate that there was any popular demand for punishment of Senators and Representatives who ignored the ratifying conventions' solemn charge that they exert their utmost influence in behalf of amendments to make the Senate more effectively subject to the legislatures' will.

Nor did the State governments make any particular effort to utilize the services of U.S. Senators in performance of other missions for the States—as they might have been expected to do if Senators were the "convenient link" between the State and Federal Governments envisioned by the authors of the *Federalist* papers. Governors and legislatures were just as apt to communicate directly with the President. Or they might ask both Senators and Representatives from their States to present memorials, addresses, and other communications to the President in their behalf. For instance, in 1789—

> * * * the Address of the Honorable Legislature of the Commonwealth of Massachusetts to the President of the United States, was presented by the two Senators and eight Members of Congress, from that district * * *.

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[11] *Elliot's Debates*, I, 337.

[12] *Independent Chronicle* (Boston), Mar. 4 and 11, 1790; *Gazette of the United States*. Mar. 13, 1790.

The following year Senator Few and the three Georgia Representatives presented an address of the Georgia Legislature to the President. In 1795 the New Hampshire Legislature resolved that—

> * * * his excellency the Governor be, and he is hereby requested to transmit the remonstrance of the Legislature to Congress, upon the subject of the interference of Congressional jurisdiction with the laws of this state, and the Senators and Representatives of this state in Congress, be desired to attend to and enforce the same.[13]

Sometimes States employed special agents to present their claims to the Federal Government. For example, the Legislature of Massachusetts in 1790 appointed Nathan Dane to act as its agent in supporting the State's claims against the United States.[14] Virginia employed John Steele, former Representative from North Carolina, to help settle Virginia's accounts with the Federal Government.[15] Senators alone did, indeed, sometimes perform extra-legislative services for their States, but this did not happen sufficiently often to give the impression that Senators in any special sense were considered agents of their States in dealings with the Federal Government.

State governments were, of course, equally interested in obtaining favorable action from the national House of Representatives as from the Senate, since Senate action alone would have had very little value. They therefore were apt to address resolutions to both Houses. Also, in matters of this kind the personal factor is often important, and State officials would be just as likely to be on close terms with House Members as with Senators.

House Members were often just as likely as Senators to report to Governors and legislatures concerning political developments at the National Capital. Many examples can be cited. Roger Sherman while a Member of the House considered it his "duty" to inform Connecticut's Governor Huntington of events and discussions in Congress, a practice which he naturally continued after his election to the Senate. Governor Oliver Wolcott, Sr., was on intimate terms with Connecticut's entire congressional delegation and kept up a running correspondence with Members of both Houses. While a Member of the House of Representatives, Paine Wingate continued the practice he had begun as a Senator of writing frequently to President (Governor) Bartlett of New Hampshire about events in the National Capital, in and out of Congress—a very natural practice in view of the fact that Wingate and Bartlett were related by marriage and were close personal friends.[16] Senator William Few of Georgia wrote to Governor Edward Telfair in 1790 reporting briefly on certain activities of the second session of the First Congress, adding:

> General Jackson and Colonel Gunn [Representative James Jackson and Senator James Gunn of Georgia] are going on to Georgia and inform me they will both attend the Assembly at Augusta in Nov^{r} next and to them I must refer you for further information relative to this negociation [treaty with the Creeks] and proceedings of Congress.[17]

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[13] *Connecticut Courant*, July 20, 1789; Fitzpatrick, *Diaries of Washington*, IV, 104, entry dated Mar. 17, 1790; *Gazette of the United States*, Feb. 5, 1795.

[14] *Gazette of the United States*, Mar. 10, 1790.

[15] *Calendar of Virginia State Papers, 1652–1869* (Richmond: Superintendent of Public Printing, 1875–93), VII, 453–455.

[16] Boardman, *op. cit.*, pp. 310–312; Gibbs, *op. cit.*, I, *passim;* Wingate, *op. cit.*, II, *passim.*

[17] "Senator Few on the second session of the First Congress, 1790," *American Historical Review*, XVI (July 1911), pp. 789–790.

Even in North Carolina, where the U.S. Senators' special obilgations to the legislature were subject to a furious controversy, U.S. Representatives made it a practice to attend sessions of the legislature to give an account of their stewardship, their assiduity in this respect at one time being favorably contrasted to alleged laxness on the part of the Senators.

This generalization to the effect that during the period under study Senators were not singled out as the peculiar connecting link between the State and Federal Governments does not apply—at least in full force—to Virginia. The U.S. Senators from the Old Dominion apparently believed that they were under special obligation to report to the Governor and assembly concerning their conduct as the State's agents in the Senate. A month after the Senate achieved its first quorum in 1789, Senators Lee and Grayson wrote Gov. Beverley Randolph promising to forward such information as he might find useful.[18] They and their successors continued the custom of intermittently reporting to the Governor or the speaker of the assembly concerning their activities. On one occasion, James Madison, then a member of the House, in transmitting certain reports to the Governor, felt called upon to explain that he was sending them because the Senators might not have been in position to do so.[19] This sense of obligation on the part of the Virginia Senators was partly a reflection of the formally accepted view that the Senate was, in a peculiar sense, the agent of the States. However, it was also a reflection of Virginia particularism, which bound all of the State's congressional delegation—in Senate and House alike—very closely to the State government.

The whole political climate during this formative period militated against practical application of the idea that the Senate was the special representative of sovereign States. Unlike the situation in imperial Germany, where members of the upper house were the appointees of the rulers of the member states and subject to their control—and despite the differences between the membership of the two Houses pointed out in chapter IV—Senators were very much the same type of individual as made up the House of Representatives. Unlike the members of the Bundesrat, the Senators were responsible (although indirectly) to the voters.

Despite their lipservice to the concept of the Senate as an instrument for preserving the "residual sovereignty remaining in the individual States," the proponents of a strong central government at the Constitutional Convention acted with acumen born of experience in practical politics when they gave Senators the comparatively long term of 6 years—during which time several legislations would come and go—and refused to make them subject to recall by the legislatures which elected them.

INSTRUCTION OF SENATORS BY STATE LEGISLATURES

The whole question of utilizing the Senate as the special representative of the States as political entities was brought to a head in a fierce running controversy over the right of State legislatures to *instruct* U.S. Senators as to their official conduct.[20]

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[18] Letter, Lee and Grayson to Randolph, May 26, 1789, Ballagh, *op. cit.*, II, 485.

[19] Letter, Madison to Randolph, July 22, 1792, *Virginia State Papers*, V, 640. For Virginia Senators' letters to Governor or assembly, see Ballagh, *op. cit.*, II, *passim*, and *Virginia State Papers*, V to VIII, *passim*.

In this connection, the term "instruction" is used in the sense of a *command* issued by the legislature of a given State to the Senators from that State with the understanding that the latter would consider it binding. The ability of the legislature thus to control the official activities of the Senators was widely regarded as a logical concomitant of the concept that the Senate was the special representative of the sovereignty left to the States. This type of instruction should not be (but sometimes was) confused with instructions, directed to both Senators and House Members, based on the theory that all constituents, including the citizens of a State acting through their legislature, have the right to instruct their representatives in both Houses as to how to conduct themselves in their official capacities. Instructions issued on the latter basis were grounded on the concept of popular government and did not necessarily involve the idea of the Senate as the agent of the States.

It had been the custom in various American States from colonial times for citizens gathered in public meetings to pass resolutions instructing the members of the legislatures from their districts as to how to vote. While the binding nature of such instructions was open to dispute—some Members accepted them as mandatory while more independent souls objected to being mere "vote-recording machines"—the practice of issuing such directives was very widespread. It was quite natural then that the custom should be applied to the newly formed Congress of the United States.

Thus among the amendments to the Constitution proposed by Representative Thomas Tucker of South Carolina was one adding to the guarantee of the right to appeal for redress of grievances a further guarantee of the right of the people "to instruct their Representatives." Defeated in the House after a long debate, the amendment was introduced in the Senate by either Lee or Grayson of Virginia, but received only their votes. This amendment was one of several introduced by the Virginians to reinforce popular sovereignty which were apparently considered too democratic, impractical, or redundant by the great majority of their colleagues.[21] It should be emphasized that this amendment referred to *the people* instructing both Senators and Representatives and therefore did not involve the question of the Senators' accountability to the State legislatures, an issue on which the Senate took no official action.

The concept of bridling Senators through instructions from State legislatures had another parentage. During the Confederation period, when State legislatures had the power to appoint and recall delegates to Congress at will, and when Congress was little more than a council of States, the legislatures naturally instructed their delegates as to their official conduct. When the Constitution was adopted, the Senate with its equal representation of the States, large and small, and its election by the State legislatures, was naturally considered to be of much the same nature as the Congress of the Confederation. What could be more natural than to perpetuate the practice of binding Members by instructions?

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[20] For discussions of the general history of the right of legislatures to instruct U.S. Senators, see Riker, *op. cit.*; Haynes, *Senate of the U.S.*, II, 1025–1034; and William E. Dodd, "The Principle of Instructing United States Senators," *South Atlantic Quarterly*, I (October 1902), pp. 326–332.

[21] *Annals*, 1st Cong., 1st sess., Aug. 15, 1789, pp. 761–777; *Senate Journal*, 1st Cong., 1st sess., Sept. 3, 1789, p. 117.

In the campaign to ratify the Constitution, Federalist leaders of the stature of Rufus King and John Jay categorically accepted the right of legislatures to instruct. Said Jay in the New York convention:

> I presume they [the legislatures] will also instruct them, that there will be a constant correspondence supported between the senators and the state executives, who will be able, from time to time, to afford them all that particular information which particular circumstances may require.[22]

Rufus King in the Massachusetts convention was even more emphatic:

> And the state legislatures, if they find their delegates erring, can and will instruct them. Will not this be a check? When they hear the voice of the people solemnly dictating to them their duty, they will be bold men indeed to act contrary to it. These will not be *instructions* sent them in a private letter, which can be put in their pockets; they will be public instructions, wnich all the country will see, and they will be hardy men indeed to violate them. * * * [T]he powers to control the Senate are as great as ever was enjoyed in any government * * *.[23]

It should be remembered, however, that during the ratification campaign supporters of a strong central government went out of their way to stress the Senate's accountability to the States in order to allay the apprehensions of those who feared for the continued vitality of the State governments. At the same time they stressed the Senate's expected insulation from the popular passions which might sweep over the legislatures and were careful to withhold support from recall of Senators, which alone could have made instructions meaningful. The fact that the conventions of only 2 of the 13 States recommended a recall amendment lent at least some weight to the theory that a majority of the delegates contemplated a Senate not too rigidly rsponsible to the legislatures.

As might be expected, the question of instructions was argued in the First Congress. Unfortunately, few details of the discussion are available, even Maclay's comments being quite brief. The problem is further complicated by the fact that Maclay and others sometimes did not make a distinction between instructing Senators and instructing House Members, being primarily interested in the democratic principle involved.

However, Maclay clearly understood the importance of instruction of Senators as a means of fortifying the Senate's position as agent of the States. On one occasion he wrote an article for the newspapers "with a design to spirit up the State legislatures to attend to their own importance and to instruct their Senators on all important questions." [24] In fact, Maclay rather hesitatingly expressed, in the secret of his diary, a willingness to carry the right of instruction to a point very close to the principle of nullification, which became such a critical issue 40 years later:

> The doctrine of instruction may certainly be carried so far as to be in effect the tribunitial veto of the Romans, and reduce us to the state of a Polish Diet. But it is introduced. Perhaps the best way is for all the States to use it, and the general evil, if it really should be one, will call for a remedy. But here is a

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[22] *Elliot's Debates*, II, 283.
[23] *Ibid.*, II, 47.
[24] Maclay, *op. cit.*, p. 193, entry for Feb. 7, 1790.

> subject worthy of inquiry: Is it to be expected that a Federal law passed directly against the sense of a whole State will ever be executed in that State? If the answer is in the negative, it is clearly better to give the State an early legislative negative than finally let her use a practical one which would go to the dissolution of the Union.[25]

A year later the question was canvassed in a vigorous debate occasioned by the Virginia Senators' introduction of a resolution to open the Senate's legislative proceedings to the public. This resolution involved the principle of instruction in two ways: first, it was introduced by the Virginians in obedience to instructions from their general assembly and, second, the general assembly insisted on open Senate doors partly to enable the legislatures to scrutinize the conduct of the men they had elected to the Senate. In this debate, Maclay apparently crossed swords with a whole troop of strong Federalists.

Ellsworth of Connecticut claimed that instructions "amounted to no more than a wish, and ought to be no further regarded." Izard of South Carolina said that legislatures had no more right to instruct Senators than electors had to instruct the President. Robert Morris, Maclay's colleague from Pennsylvania, claimed that legislatures were "only the machines to choose" Senators, who were Senators of the Nation rather than of individual States. He even asserted that a Senator "had nothing to do with one State more than another."

On this occasion, Maclay matched such arguments not with the doctrine that the Senate was the defender of State sovereignty but with reasoning based on a Senator's accountability to his constituents.

> Were we chosen with dictatorial powers, or were we sent forward as servants of the public, to do their business? The latter, clearly, in my opinion. The first question, then, which presented itself was, were my constituents here, what would they do?[26]

The Senate's subsequent 17-to-9 vote rejecting the Lee-Monroe move to open the Senate's doors involved too many other factors to allow interpretation of the result of this debate strictly in terms of opinions concerning the right of legislatures to instruct.

It is manifestly impossible in a work of this scope to describe the stand of each of the State legislatures on the question of instructing U.S. Senators—especially since the stand of some legislatures fluctuated with their changing party majorities. However, a brief description of the controversy in some of the States will serve to illustrate this period's contribution to the history of the question.

NORTH CAROLINA

Consideration of the stands taken by the State legislatures on this issue turns one's thoughts immediately to North Carolina, where the question very early became the subject of long and acrimonious dispute.[27]

That this was so is not surprising. North Carolinians were so conscious of their State's sovereignty and so proud of its newly won independence that they were loath to accept a central government with extensive powers. It was thus natural for the State to endeavor to make effective the doctrine that the Senate had been created for the express purpose of preserving the wide area of sovereignty left to the States, and that this effort should take the form of instructions which the legislature considered binding on the Senators which it elected. Such instructions might have caused little controversy, however, had it not been for the fact that the legislature, in the very temporary swing to Federalism at the time the State ratified the Constitution, elected two U.S. Senators of Federalist persuasion, Governor Samuel Johnston and Benjamin Hawkins, both of whom not only denied the right of the legislature to issue binding instructions but soon proved themselves out of harmony with the policies of the legislature's new radical majority.

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[25] *Ibid.*, p. 220, entry for Mar. 22, 1790.

[26] *Ibid.*, pp. 399–400, entry for Feb. 24, 1791.

[27] This subject was considered in some detail by Earl R. Franklin in "The Instruction of United States Senators by North Carolina," *Trinity College Historical Papers*, VII (1907), 1–15. See also Delbert Harold Gilpatrick, *Jeffersonian Democracy in North Carolina, 1789–1816* ("Columbia University Studies in History, Economics, and Public Law," vol. CCCXLIV [New York: Columbia University Press, 1931]), and Henry McGilbert Wagstaff, *State Rights and Political Parties in North Carolina, 1776–1861* ("Johns Hopkins University Studies in Historical and Political Science," vol. XXIV [Baltimore: Johns Hopkins University Press, July–August 1906]).

These radicals, not even completely reconciled to North Carolina's membership in the Union, were highly incensed over passage of the assumption bill, secrecy of the Senate sessions, the scale of Federal salaries, and the prospect of an excise tax. They seemed to feel that if Johnston and Hawkins had exerted themselves more vigorously they could have averted all or most of these "calamities." More to the point here, the North Carolina Senators had committed the unpardonable sin of failing to send to the legislature and to Governor Martin frequent reports concerning their activities, as well as copies of the *Senate Journal*. They had then filled their cup of iniquity to overflowing when they failed to attend the session of the legislature which met at Fayetteville the first Monday of November 1790. This even the North Carolina Members of the U.S. House of Representatives had faithfully done even though they did not have the direct obligation to the legislature which the Senators allegedly had.[28]

Seething with anger and frustration, the legislature occupied itself throughout most of the session with speeches denouncing Johnston and Hawkins and formulation of instructions to direct their conduct in the session of Congress to convene in December.

On November 24, 1790, the State's house of commons adopted a resolution expressing the deepest disappointment in Johnston's and Hawkins' lack of "industry in discharging the trust reposed with them," and then ordering them in most preemptory terms to exert themselves unremittingly to effect opening of the Senate doors, to correspond "regularly and constantly" with the legislature while in session and with the Governor during its recess, to transmit to the Governor copies of the *Senate Journal* once a month (although it was printed only after each session), to work for strict economy in the Federal Government, to strive for reduction of its "monstrous salaries," and strenuously to oppose every excise and direct-tax law which might be proposed. The Commons then appointed a committee to suggest further instructions to the Senators (as well as recommendations to the House Members) which might seem appropriate in the future.[29]

The State senate toned down the resolution slightly (the *Senate Journal* was to be transmitted every session rather than every month and Federal salaries were described as "enormous" rather than "monstrous"), but by the time the resolution was finally adopted two more instructions had been found necessary—to reroute the U.S. mail in North Carolina and to make the Federal courts more convenient to its citizens. The Governor was then requested to transmit copies of the resolution not only to Johnston and Hawkins, but also to the legislature of each of the States—apparently as an example of how to deal with recalcitrant U.S. Senators.[30]

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[28] Letter, A. Maclaine to James Iredell, Nov. 18, 1790, McRee, *op. cit.*, II, 302.

[29] *Gazette of the U.S.*, Jan. 5, 1791.

First learning of the legislature's resolution through a newspaper story, Hawkins wrote to Alexander Hamilton for an opinion concerning the legislature's right to instruct. The Senator's own stand on the question was forthright:

> Being of opinion that the Constitution marks the line of my duty, and that it is obligatory on my honor to make my own Judgment the ultimate standard after paying suitable respect to the Opinions and observations of others I have acted in conformity on a recent occasion. [Hawkins and Johnston both voted for the excise tax on distilled liquors.] Altho' it is much to be wished that a discussion of this sort should never have happened, yet in the present case being inevitable, a right decision is of the utmost consequence to the Union.—If the states have a right to instruct, why are we bound by oath support to [*sic*] the Constitution?[31]

Hamilton's reply is not available, but Hawkins and Johnston subsequently sent a joint reply to the legislature, defending their position and stating that they felt themselves constitutionally bound to act in acordance "with the general interests of the Union."[32]

Johnston and Hawkins were not without friends in the State. These represented the conservative element which deprecated the State's extreme particularism and what they considered the majority's irresponsible opposition to Federal policies. After passage of the resolution lecturing the Senators, the minority in the house of commons adopted a counter-resolution remonstrating against the majority's local and partisan spirit and its tendency to blame the North Carolina Senators for the alleged faults of the whole U.S. Senate, objecting to instructions from the Governor as apt to be tainted with prejudice and localism, and praising the Senators for acting with integrity and propriety in support of the public good. The resolution admitted that it might have been a good idea for the Senators to write the legislature from which they had received their appointment, but only out of respect—not because silence would be "a crime." In fact, the minority would have regretted any act on the Senators' part expressing "locality" rather than the general good.[33]

One of the conservative leaders, John Hay, claimed that much of the resentment in the assembly against the Senators was stirred up by Members of the Federal House of Representatives who attended the session with an eye to the coming election.[34] U.S. Supreme Court Justice James Iredell, from his vantage point in the National Capital, wrote to his home State earnestly defending Johnston's and Hawkins' attention to duty in the Senate. Johnston, ill with influenza, had even attended sessions at the hazard of his life. It was the duty of the clerks of Congress, not the Senators, to forward the *Journals* of the two Houses. Then he pointed out an important factor no doubt ignored by many in North Carolina:

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[30] *Ibid.*, Jan. 19, 1791.

[31] Letter, Hawkins to Hamilton, Feb. 16, 1791, "Papers of Alexander Hamilton," Library of Congress Microfilm, vol. XI.

[32] Gilpatrick, *op. cit.*, pp. 49–55. For the source of the Senators' letter, which was dated Feb. 22, 1791, Gilpatrick cited *Governor's Letter Book*, X, 189–197, the original letter in "Governor's Papers," vol. XVIII.

[33] *Gazette of the U.S.*, Feb. 5, 1791, quoting *North Carolina State Gazette*, n.d.

[34] Letter, Hay to Iredell, Dec. 16, 1790, McRee, *op. cit.*, II, 303.

> Formerly it was necessary to correspond frequently with the Executive and Legislature of each State, because their co-operation was constantly wanting to carry into effect almost any public measure. Congress have now authority to execute their own acts [through Federal officials].

Iredell could see no point in the Senators communicating with the assembly unless they had some important official information to report. Letters merely detailing newspaper articles, debates, or unfinished business appeared to him highly ridiculous. Furthermore, the time between the opening of the legislature and the opening of Congress was too brief for the Senators to attend the legislature and still reach the National Capital in time. "Mr. Johnston," he added, "had to carry his wife and a young child with him, who for 3 months almost had appeared to be at the point of death." [35]

With respect to instructions to the Senators, Iredell did not object to the principle, but did object to the assembly ordering Johnston and Hawkins to oppose excise taxes without allowing them any discretion based on their knowledge of the Federal Government's desperate need of funds to defend the West.

> An excise or direct tax is the only alternative. But the Senators of North Carolina must not agree to either. What then becomes of their oath, of their duty to the Union whose interests they are appointed to guard, of their honor as public men to support the public faith inviolate, of their pride as individuals to save their country from disgrace, of their attachment to North Carolina, to shield her from a share she cannot avoid in the common calamity and wretchedness of the whole.[36]

Disregarding their instructions, Johnston and Hawkins voted in favor of the excise tax. However, according to William R. Davie, Senate amendments "perfectly reconciled" the people of North Carolina to the measure.[37] The North Carolina Senators continued to refuse to be browbeaten by the legislature or the Governor. They insisted on their right to act independently, Johnston writing to defend his support of the excise tax and closed Senate doors and Hawkins even going so far as to suggest certain improvements in the legislature.[38] The issue was clear cut; the radical majority of the legislature considered Senators primarily the agents of the individual States; Johnston and Hawkins considered themselves agents of the Union. In fact, in their support of a strong central government they were to the right of most of the North Carolina Federalists, who, in defending the new central government, revealed themselves to be merely States rights men "*inside* the Union." [39]

Although subjected to frequent carping criticism, Johnston and Hawkins completed their terms in 1793 and 1795, respectively. They were replaced by Gov. Alexander Martin and Timothy Bloodworth, men more in tune with the philosophy of the legislature. The heated conflict between the legislature and the Senators was thus over. In fact, Martin, in his acceptance speech, while promising to promote the general good of the Nation, declared that his "principal care" would be to preserve inviolate "the individuality and internal sovereignty of the State." [40]

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[35] Letter, Iredell to John Hay, Apr. 14, 1791, *ibid.*, II, 326-330.

[36] McRee, II, *loc. cit.*

[37] Letter, Davis to Iredell, Aug. 2, 1791, *ibid.*, II, 335; *Senate Journal*, 1st Cong., 3d sess., Feb. 12, 1791, pp. 88-89.

[38] Gilpatrick, *op. cit.*, p. 57, citing "Governor's Letter Book," X, 203-207, and "Governor's Papers," XIX, 17.

[39] Wagstaff, *op. cit.*, pp. 35-37.

The assembly, for its part, continued to insist that U.S. Senators were subject to its instructions. In 1791 and 1792 it explicitly asserted that the practice was "inseparable from the right of electing" Senators.[41] As some of its demands—such as open Senate sessions—were met, the legislature's demands became somewhat less imperious, but the right to instruct continued to be stoutly maintained. It was Alexander Martin who, in 1794, introduced the resolution which finally led to opening the Senate's doors. That resolution was based squarely on the Senate's alleged accountability to the State legislatures, an accountability which could not be fully effective unless the legislatures could know what the Senators were doing behind the Senate's doors:

> *Resolved*, that the Senate of the United States, being the Representatives of the sovereignties of the individual States, whose basis is the people, owe equal responsibility to the Powers by which they were appointed, as if that body were derived immediately from the people * * *.[42]

In spite of this explicit acceptance in North Carolina of the concept that the Senate was the special representative of State sovereignty, it should be emphasized that this doctrine was merely part of the larger picture of North Carolina particularism, democracy, and opposition to Hamiltonian finance. It was popular among the State's radical majority during the terms of Johnston and Hawkins because it provided constitutional authority for attempting to force them to oppose the Hamilton financial program. It harmonized nicely with the generally accepted practice of the people instructing their legislative representatives—be they members of the assembly, U.S. House of Representatives, or Senate. The assembly, claiming to speak for the people of the State, was just as anxious to control the votes of the House delegation as of the Senators—all in the interest of specific measures which its majority favored. In a State with North Carolina's firm devotion to State sovereignty, members of the Federal House delegation often found it just as awkward to violate the assembly's "requests" as the Senators did to disobey its "instructions." In fact, the term "request" or "recommendation" were often used synonymously with "instruction," so that the distinction between the Senators' and Representatives' accountability to the legislature was often blurred—and with it the concept of the Senate as the peculiar agent of the States.[43]

However, in cases of disobedience to the assembly's wishes, the sanction against offending Senators was far stronger. In 1813, the assembly severely rebuked Senator David Stone for his votes against measures for prosecution of the war. On his part, Stone felt that his continued opposition to the course of conduct laid down by the assembly made it necessary for him to resign, which he did the following year. In later years, four other North Carolina Senators were pressured into resigning for disobedience to the assembly's instructions—Mangum in 1836, Brown and Strange in 1840, and Haywood in 1846.[44]

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[40] Gilpatrick, *op. cit.*, p. 57, citing North Carolina, *House of Commons Journal*, 1792, p. 38. Martin was thereafter inclined to jump back and forth across the Federalist fence. In 1798 he voted for the Alien and Sedition Acts.

[41] *Ibid.*, p. 54, citing North Carolina *House of Commons Journal*, 1791, p. 48, and *ibid.*, 1792, p. 62.

[42] *Annals*, 3d Cong., 1st sess., Jan. 16, 1794, pp. 33–34.

[43] For an example of this attitude on the part of North Carolina's House delegation toward recommendations of the assembly, see a group of speeches in Congress by John Stanly, Robert Williams, and Archibald Henderson, *Annals*, 7th Cong., 1st sess., Feb. 16, 1802, pp. 523, 531, 569. Said Henderson: "* * * I cannot forbear lamenting extremely that I should unfortunately be placed in a situation where the highest obligations of duty compel me to act in opposition to the wishes of that community to which I immediately belong." He equated the wishes of that "community" with those of the North Carolina Legislature.

VIRGINIA

During this period, Virginia's stand with respect to instruction of Senators coincided with North Carolina's. However, since none of the Senators from the Old Dominion controverted the assembly's right to instruct, or differed materially from its majorities in political sentiment, there were no bitter clashes between assembly and Senators such as livened the politics of the State's neighbor to the south.

In Virginia, as in North Carolina, belief in the people's right to instruct their legislative representatives was very strong. And in Virginia—whose U.S. Senators referred to their State as "my country"—the majority also feared the consolidating effects of the Government established by the Constitution and thus felt a need for machinery to protect the rights of the States. Instruction of Senators by the assembly fitted naturally into such a picture.

In the Senate's first year the Virginia Assembly firmly established the custom of instructing Senators, and the latter just as firmly accepted the right of the assembly to do so. In a letter to the speaker of the Virginia House, Senators Richard Henry Lee and William Grayson reported on their efforts in behalf of the constitutional amendments demanded by their State:

> We can assure you Sir that nothing on our part has been omitted to procure the success of those Radical Amendments proposed by the Convention and approved by the Legislature of our Country, which as our Constituent we shall always deem our duty with respect and reverence to obey.[45]

The Virginia Assembly was even more vociferous, if that were possible, than its North Carolina counterpart in the demand for opening the Senate's doors. The most prominent reason for the demand was the claim that—

> the Senators of the United States are individually responsible in their conduct to their constituents, who are entitled to such information as will enable them to form a just estimate thereof.[46]

This claim is seen in its true significance when it is remembered that the Virginia Assembly considered itself one of the immediate "constituents" of the Senate. Year after year the assembly passed resolutions instructing the Virginia Senators to work for public sessions of the Senate. Year after year they complied, keeping the issue alive and laying a solid groundwork for Alexander Martin's successful effort in 1794.

On at least one occasion the Virginia Senators apparently acted against their own better judgment in complying with the assembly's commands, issued on a variety of subjects, but they seem to have complied with the instructions as a matter of course.[47]

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[44] For the events leading to Stone's resignation, see Gilpatrick, *op. cit.*, pp. 208–216. See also Riker, *op. cit.*, pp. 459–460 fn.

[45] Letter, Lee and Grayson to Speaker of the Virginia House of Representatives, Sept. 28, 1789, Ballagh, *op. cit.*, II, 507–509.

[46] Resolution introduced in the Senate, Jan. 3, 1793, *Senate Journal,* 2d Cong., 2d sess., same date, pp. 28–29.

[47] Rufus King MS dated May 6, 1794, describing debate in the Senate, King, *op. cit.*, I, 525–526. On another occasion, the Virginia Senators explained to the Governor that they were remaining "quiescent" on two important resolutions of instructions until official copies were received. Thus far they had not seen these resolutions anywhere but in the newspapers. See letter, Lee and Monroe to Gov. Henry Lee, Feb. 14, 1792, Ballagh, *op. cit.*, II, 546.

Senator Stevens T. Mason's widely denounced violation of the secrecy of the Senate's Jay Treaty proceedings in releasing an abstract of the treaty to a Philadelphia newspaper has been defended by a fellow Virginian on the basis that, in the thought of the time, Mason's first duty was to comply with the wishes of his State as expressed by its legislature. The Senator's action was approved by the Virginia Assembly by direct vote and by reelection.[48]

By their ready acceptance of the theory that they, as the special representatives of the sovereignty of their State, were subject to the instructions of the general assembly, the Virginia Senators added strength to the concept. However, in so doing they prevented the concept from becoming a critical issue in their State and made its acceptance more a question of legalism than of practical politics. The fact was that Virginia, with its block of 19 Members in the House led by energetic and vocal statesmen, was inclined to place greater dependence on the lower Chamber than on the Senate to defend its interests, the upper House during this entire period being in control of forces out of sympathy with Virginia's aims.

When Virginia's Thomas Jefferson and James Madison considered it necessary, through the Kentucky and Virginia resolutions, to sound a call for defense of States rights, they did so through direct appeals to the other State governments, not through the body which was supposed to be the special preserver of the sovereignty left to the States.

In subsequent years the Virginia Assembly continued to insist not only on its right to instruct Senators but also on its right to obedience on their part. By 1836 five Virginia Senators had been impelled to resign for failure to cooperate with the assembly's instruction—Giles, in 1815, Tazewell in 1832, Rives in 1834, and Tyler and Leigh in 1836.[49]

MASSACHUSETTS

The Massachusetts General Court established no fixed policy on the question of "instructing" the Senators from that State.

In 1790, either Tristram Dalton or Caleb Strong—staunch Federalists both—produced instructions directing them to vote for assumption of State debts.[50] At a special session, in September 1793, the legislature "instructed" the Senators and "requested" the Representatives to do all in their power to obtain a constitutional amendment to remove any possibility that States might be suable in U.S. courts.[51] In the latter case, "instruction" of the Senators may have been an expression of an outburst of particularism excited by the U.S. Supreme Court's recent summoning of the Massachusetts Governor and attorney general to attend court in person to defend the State in a suit brought by William Vassel, one of the State's detested loyalists. At any rate, in the later years of the decade, the usual practice was for the General Court merely to "request the Senators and Representatives in Congress" to act in accordance with its recommendations.[52]

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[48] Hugh Blair Grigsby, *History of the Virginia Federal Convention of 1788 With Some Account of the Eminent Virginians of That Era Who Were Members of the Body* ("Collections of the Virginia Historical Society," Nos. IX and X, n. s. [Richmond: Virginia Historical Society, 1890–91]), pp. 238–241.

[49] Riker, *op. cit.*, pp. 459–460 fn.

[50] Maclay, *op. cit.*, p. 288; *Gazette of the United States*, June 12, 1790.

[51] *Aurora*, Dec. 3, 1793.

[52] *Gazette of the United States*, Dec. 20, 1793; letter from Hon. Edward J. Cronin, Secretary of the Commonwealth of Massachusetts, July 1, 1957, citing chs. 67 and 152 of the "Resolves of 1798" and ch. 154 of the "Resolves of 1799."

RHODE ISLAND

On at least one occasion the Legislature of Rhode Island instructed its Senators during this period. In December 1797 the legislature passed a resolution "instructing" the Senators and "requesting" the Representatives to work for repeal of the act passed at the previous session of Congress levying a tax on stamped vellum. Federalist Senator Ray Greene complied with the instruction, for which he was chided by the Senate's Federalist President *pro tempore*, Theodore Sedgwick:

> Mr. Green [*sic*] except that he obeyed the instructions of the State of Rhode Island in moving and advocating a repeal of the Stamp Act, in which I am sure he sacrificed at the shrine of popularity, has never deviated from a right line.[53]

MARYLAND

Maryland's John Henry, who had served long and honorably in the Continental Congress during and after the Revolution, refused to obey instructions from the Maryland Assembly to vote for opening the Senate's doors. For this he was censured by the house of delegates. However, his independence apparently was no bar to further preferment by the assembly, for he was reelected for the term beginning in 1795. Two years later he became Governor.[54]

CONNECTICUT AND NEW HAMPSHIRE

Connecticut, strongly Federalist, prided herself during this period on refraining from interfering with the Federal Government. In 1796, a son of Connecticut, Secretary of the Treasury Oliver Wolcott, wrote his father that "the legislature of Connecticut has never yet meddled with the affairs of the general government * * *."[55]

The frequent letters of Senator (later Representative) Paine Wingate of New Hampshire to the Governor of his State show no evidence of instructions from the legislature.[56]

SOUTH CAROLINA

At least two of South Carolina's Senators—both of them stalwart Federalists—refused to accept the theory that they were subject to instructions from the legislature. As mentioned above, Ralph Izard claimed that legislatures had no more right to instruct Senators than electors had to instruct the President. The redoubtable Jacob Read declared in a 1795 Senate debate:

> In local questions, affecting none but the interests of his constituents, he should attend to their voice, but on great national points, he did not consider himself as a Representative from South Carolina, but as a Senator for the Union. In questions of this last kind, even if the wishes of his constituents were unequivocally made known to him, he should not conceive himself bound to sacrifice his opinions to theirs.[57]

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[53] Letter, Sedgwick to Rufus King, Apr. 9, 1789, King, *op. cit.*, II, 311.

[54] "John Henry," *Dictionary of American Biography*, VII, 549.

[55] Letter, Oliver Wolcott, Jr., to Oliver Wolcott, Sr., Apr. 18, 1796, Gibbs, *op. cit.*, I, 328. "There does not seem to be any reference to any instructions being given by the Connecticut General Assembly to the men chosen as U.S. Senators from Connecticut," wrote Mary E. Smith, Connecticut archivist, to the present writer on June 28, 1957, after perusal of the State's *Records* for 1789 to 1799.

[56] Wingate, *op. cit.*, II.

[57] *Annals*, 4th Cong., 1st sess., Dec. 11, 1795, p. 20.

PENNSYLVANIA

As will be recalled, the views of Pennsylvania's Senators Robert Morris and William Maclay collided head-on in 1791 on the question of instructions, Morris denying that the legislature had the right, Maclay not only declaring that it did but actually encouraging the legislature to assert its prerogative in this field. However, Maclay seems to have had little support for his stand even from among men of his own political persuasion. The issue in Pennsylvania thereafter involved not so much the general assembly's alleged right to control the Senators through instructions, but the question whether or not it had any right to attempt to influence Congress in any way whatever.

Early in 1791 the Pennsylvania House of Representatives adopted by a 40-to-16 vote a resolution on the proposed Federal excise. The resolution provided:

> * * * that these sentiments be communicated to the Senators representing the State of Pennsylvania in the Senate of the United States, with the hope that they will oppose every part of the excise bill now before Congress.

Eleven members of the Pennsylvania lower house, headed by the wealthy and conservative William Bingham, strongly protested passage of the resolution on the basis that the people of Pennsylvania, in ratifying the Constitution, had denied the assembly any part in the business of Federal legislation. Any attempt on its part to influence that field was sheer presumption and would lead to legislative warfare between the assembly and Congress. A bare majority of the State's senate apparently agreed with these 11, because the upper house defeated the resolution 9 to 8.[58]

The House majority thereupon issued a statement defending the resolution, denying interference but declaring that it was the members' duty as sentinels of the people's liberty to call the U.S. Senators' attention to the unfortunate and unpopular features of the proposed tax. Moreover, said they:

> We have not even proceeded to *instruct* our Senators: we have confined ourselves to a respectful "Hope" that our liberties will be attended to; if it is criminal to *hope* then are we miserable indeed.[59]

However, the Federalist forces—particularly Fenno's *Gazette of the United States*—were not mollified, but continued to insist that the action of the State's lower house arrayed that body against Congress, would incite the people against the Union, and would thus sunder the very ties of society.[60] A few months later Fenno pointed out that under the Congress of the Confederation, the State legislatures were almost constantly engaged in legislating for the Union at large through preparation of instructions to their delegates to Congress. What a wonderful difference now. Relieved of Federal business, the assembly could now effectively legislate for Pennsylvania.[61]

It should be noted that this was primarily a party battle on the issue of the excise tax, which was the source of such bitter feelings in Pennsylvania. However, in the debate the accountability of the

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[58] *Gazette of the United States*, Feb. 5, 1791.

[59] *Ibid.*, Feb. 9, 1791.

[60] *Gazette of the United States*, Feb. 9, 1791, Apr. 16, 20, and 23, 1791.

[61] *Ibid.*, Oct. 1, 1791.

Senate to the legislature was made a critical point—although it is somewhat surprising that the debate should have been joined by the lower chamber's polite "hope" that the Senators would conduct themselves in a certain manner.

In 1798 a very similar controversy occurred, this time on a resolution proposed in the State's lower chamber by William Maclay expressing opposition to war "in any shape or against any nation" unless American territory were invaded, and providing that the resolution be transmitted to the "Senators and Representatives * * * with a request that they pay due attention to the same." This resolution was defeated 37 to 33 on the Federalists' claim that the "legislature had not a right to instruct Senators in Congress," despite Maclay's plea that a citizen does not lose his right to petition Congress when he becomes a State legislator. Here the Federalists ignored the fact that the resolution was a mere "request" submitted to both Houses of Congress; they insisted that the issue revolved around the legislature's alleged right to "instruct" the Senators.

Benjamin Franklin Bache, editor of the fiercely Republican *Aurora*, admitted that the resolution was defeated because of opposition to improper interference with the concerns of the Federal Government. However, Bache's attitude may have been based on his unwillingness to admit that the resolution had been defeated on its own merits, *i.e.*, its plea for peace with France.[62]

ACCEPTED—OR REJECTED?

The above illustrations of acceptance and rejection of the practice of instructing U.S. Senators during the period 1789 to 1801, although admittedly fragmentary, are sufficient to show that in these precedent-making days there was no unanimity of sentiment on the question of whether or not Senators ought to be held accountable to the legislatures which elected them.

Both sides could appeal to the Constitution. The opponents of instruction could point to their oath, which seemed to put them on their honor to use their own best judgment. They could point to the intention of the framers to make the Senate a conservative body insulated from the vagaries of popular passions such as might be reflected in State legislatures. The proponents of instruction, on the other hand, could point to the well-established precedent of constituents instructing their legislators and then claim, with considerable justification, that the State assemblies were the immediate constituents of the Senators. Furthermore, they could refer to instruction of delegates to the Congress of the Confederation, and then point out that it was the intention of the framers to make the Senate the latter's legatee.

In view of the fact that the Philadelphia convention and the ratifying conventions had left the issue at loose ends, with even the proponents of the Constitution arguing both sides, it is not surprising that the ensuing period found a great deal of confusion on the point. The practice of instructing Senators was more generally accepted in the South than in the North; it was more generally accepted among Republicans than among Federalists, leading to reversal of policy in some States when a new party gained control of the legislature. However, even the Federalists, who were in the ascendant most of the period, sometimes endorsed the practice when it suited their political purposes, while not all Republicans approved of the practice.

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[62] *Aurora*, Mar. 21 and 23, 1798.

The country was aware of the issue. The newspapers of the National Capital described in detail the claims of the North Carolina Assembly in its controversy with Senators Johnston and Hawkins. But the response of the Nation was desultory and inconclusive. In any event, the opportunity in this crucial, formative period definitely to establish the doctrine that Senators were answerable to the legislatures for their official conduct was irretrievably lost.

AMBASSADORS WITH DIVIDED VOICES

Another factor which tended to attenuate the Senate's role of representative of the States as political entities was the constitutional provision that Senators were to vote "by head" rather than by State delegation, as had been the practice in the Congress of the Confederation.

This procedure made it possible for States to split their vote and thus nullify the concept that the two Senators from a given State were in the Senate to represent the viewpoint of that State. For a State's two Senators to vote on opposite sides of a question must indicate either that one or both felt they were responsible ultimately to their own judgment as individuals, or that the State itself was divided in its viewpoint—the latter circumstances, in turn, indicating that alinements on the issues of the day followed not State but other lines, such as economic interest or political philosophy.

Within 2 weeks after having achieved a quorum in 1789, the Senate provided that in rollcalls and ballots the Senators' names were to be called in alphabetical order rather than by State delegation as was done in the Congress of the Confederation.[63] This action was, of course, taken primarily because Senators were to cast individual votes, rather than by delegation as was the case in the previous Congress. However, there may be some significance in the fact that so early all reference to States was eliminated in Senate votes and rollcalls.

A study of Senate voting behavior during the period in question indicates that, while in most cases the two Senators from a given State cast similar votes, there were enough cases of split voting to reinforce the idea that Senators sat in the upper chamber in their individual capacity rather than as members primary of State delegations.

Seldom or never did significant votes follow State lines exactly. Among the numerous examples of State delegations in the Senate splitting their votes the following are cited at random:

Judiciary Act of 1789	Pennsylvania, South Carolina.
Assumption of State debts (1790)	New Hampshire, Pennsylvania, Maryland, Delaware.
Jay Treaty (1795)	New Hampshire, Vermont, New York, Kentucky, South Carolina, Georgia.
Punishment of bank frauds (1797)	Pennsylvania, Rhode Island, Kentucky.
Establishment of Navy (1798)	New Hampshire, South Carolina.

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[63] *Annals*, 1st Cong., 1st sess., Apr. 16, 1789, pp. 20–21.

Alien Friends Act (1798)	North Carolina, New York.
Convention with France (1801)	New York, Delaware.[64]

There were some notorious differences of opinion among members of some of the State delegations. A clear example of economic and philosophical point of view rather than State interest determining Senators' votes is the case of the first two Senators from Pennsylvania. Robert Morris, outstanding financier of the Revolution, an archetype of the capitalist element, spoke for the financial and commercial interests of eastern Pennsylvania, and consistently supported the Hamilton program. William Maclay, on the other hand, came from the agricultural Harrisburg area and spoke for the agricultural interest. This factor, together with an inherent antipathy toward anything savoring of "aristocracy," caused him to become Hamilton's most caustic critic in the First Senate. Obviously, Morris and Maclay could not both be speaking for Pennsylvania as a political entity, but spoke, rather, for conflicting social and economic elements within their State.

John Langdon, genial first president *pro tempore* of the Senate, was an ardent Hamiltonian during his first years in the Senate, but as time went on he became more and more identified with the Republican cause. This put him on the opposite side of the fence from that of Samuel Livermore, his Federalist colleague from New Hampshire, in vote after vote in the Senate. New Hampshire also spoke with a divided voice.

The same general situation was true in the case of South Carolina, where the wealthy and aristocratic Pierce Butler veered more and more toward the Republican camp, thus placing himself at odds with his Federalist colleagues. The year 1795 found the two South Carolina Senators, Butler and Jacob Read, heading the contending forces in a vigorous Senate debate on American foreign policy in general and on the merits of the Jay Treaty in particular. Senators like Langdon and Butler, incidentally, disappointed the expectations of those who believed that Senators would achieve a stronger "sense of national character" through long residence in the National Capital.[65]

Such alinements of States against themselves were due to a number of causes: changes in the political complexion of the legislatures which elected the Senators, changes in party orientation such as occurred in the cases of Langdon and Butler, and the differences that are inevitable when men have liberty to act on their own discretion.

Actually, the issues of the day were not fought along State lines at all, but along lines of regional economic interest and fundamental political philosophy. As time went on, conflicting viewpoints in these fields led to formation of the two great parties, Federalist and Republican, which took the place of the expected State allegiance as the lodestones polarizing Senate votes.

If the Senate had indeed been the defender of the sovereignty of the States, the Republican Party—with its strong overtones of States rights—should have enjoyed greater strength in the Senate than in the House. However, the reverse was true—the Federalist Party with its vigorous program of centralization, consistently found greater support in the Senate than in the lower chamber.

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[64] *Annals,* 1st to 6th Congs., *passim.* In the 1st sess. of the 4th Cong., five States—Georgia, New Hampshire, New York, South Carolina, and Vermont—split their votes on almost every important issue.

[65] *Annals,* 4th Cong., 1st sess., Dec. 11, 1795, pp. 17–20.

Since the moneyed interests of the Nation looked to the Federal Government rather than the States to advance their interest, it turned out that the framers had attempted to give the Senate two contradictory roles—defender of conservatism and defender of State sovereignty. Given their choice of these two alternatives, the Senate majority during this period readily chose the former.

CHAPTER XI

THE PERIPATETIC CONGRESS

THE SENATE IN NEW YORK

When the New York City fathers learned that the First Congress was to meet in their city, they did their very best to provide such elegant and comfortable quarters that the Government would be induced to stay permanently.

Members of both Houses were, indeed, impressed with the official accommodations furnished Congress. Even such a resolute southerner as Senator William Grayson of Virginia was quoted as being satisfied with them.[1]

Senator William Maclay, in poor health and out of sorts with the world, considered the city inhospitable. He claimed that in 6 months he did not receive a single invitation from any citizen of the city.[2] However, Members of Congress of more convivial temperament were impressed with the welcome they received from the "first people" of the city, who overwhelmed them with attention.[3]

In New York, as was the case later in Philadelphia and Washington, Members of Congress lived chiefly in boardinghouses within easy walking distance of the Halls of Congress. The Senators usually found lodging with several Members of the House delegations from their own or neighboring States. "Board in New York is very high—from seven to nine dollars per week, exclusive of firing and liquor," reported a Philadelphia paper. "Servants' board [is] twenty shillings."[4]

While at New York, Senators and Representatives fell in with the custom of making ceremonial visits to the residences of Federal officials and leaving their calling cards. Many complained that this was wearisome and time consuming, but feared to appear uncivil. "All are sick of it, and yet all follow it," wrote Senator William Paterson of New Jersey to his wife. "Such is the prevalence of fashion and the force of custom."[5] Shortly after arriving in New York to represent newly admitted North Carolina, Senator Samuel Johnston wrote:

> I have not yet had time to look much about me, my time being very much engaged in getting myself settled, and in paying and receiving visits of *ceremony*, which begin in my opinion to be carried to a ridiculous height, but those who are better informed think otherwise.[6]

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[1] Rufus King report of Senate debate, Sept. 22, 1789, King, *op. cit.*, I, 370.

[2] Maclay, *op. cit.*, pp. 313–314.

[3] Letter, William Smith to Otho Holland Williams, Apr. 6, 1789, *Williams Papers*, p. 168.

[4] *Pennsylvania Gazette*, May 13, 1789. But Maclay paid only $4 per week.

[5] Letter, Paterson to his wife, Mar. 27, 1789, Wood, *op. cit.*, p. 93, citing *Somerset County Historical Quarterly*, II, 184.

[6] Letter, Johnston to James Iredell, Jan. 30, 1790, McRee, *op. cit.*, II, 279.

An important social function at the new Federal Capital was President Washington's semiweekly levee, which Senators frequently attended, by choice or from a sense of duty, and which was considered so important that the Senate on at least one occasion adjourned early so that its Members would be sure to arrive on time. The President also made it a point to invite all Members of Congress to state dinners in some kind of rotation—dinners which Senator Maclay professed not to enjoy but felt slighted if he missed.[7]

Vice President and Mrs. Adams also felt called upon to entertain all the Members of Congress at their beautiful rural residence, Richmond Hill. This they proceeded to do in methodical fashion, beginning with the six Senators whose wives and families were in the Capital, then the other Senators, and finally the Representatives.[8]

Another important center of social life at New York was the new home of John Jay at No. 8 Broadway. Mrs. Jay, a daughter of Governor Livingston, gave a dinner almost every week in addition to those for the diplomatic corps.[9]

At New York at least one State delegation in Congress—Pennsylvania's—adopted the practice of meeting weekly at a local tavern—Simons' or Brandon's—for a long dinner meeting. At such dinners, usually beginning about 3 on Monday afternoon and often lasting far into the evening, the 2 Pennsylvania Senators and 13 House Members laughed and joked over oysters and wine (sometimes too much of the latter), but also discussed assumption, a permanent location for the National Capital, and other issues before Congress. On one occasion they discussed the possibility of serving as a caucus to nominate either Senator Morris or Speaker Muhlenberg for Governor. Sometimes non-Pennsylvanians were invited—once all the Senators who favored Philadelphia for the Capital (11 came), once the Vice President and the executive officers of the Government (Hamilton, Jefferson, and Knox came). The clear purpose of some of the meetings was to plan strategy for united action on the floors of Congress. Despite his disagreements with Senator Morris and other members of the delegation, even the choleric Maclay sometimes seemed to enjoy these dinners.[10]

Less formal social activities at New York were the theater and long walks around Manhattan—the latter another form of recreation which sometimes mixed business with pleasure.

> It is now four o'clock, and I will take a walk.
>
> In my walk I fell in with Mr. Sturges, Mr. Wyngate, and Mr. Goodhue. We took a circuit on the island and came into town. On the way we talked of the permanent residence. * * * They asked me to go to their lodgings to drink tea. I did so. There we found Mr. Thacher and Mr. Grout.
>
> * * * * * * *
>
> [I] set off to come home. Colonel Few [Senator from Georgia] overtook me, and we took a long walk to view the gardens of a Dutchman who lives beyond the Bowery. Spent some time, with a degree of satisfaction, viewing his harmless and silent little beauties of the garden.[11]

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[7] Maclay, *op. cit.*, pp. 69, 137–138, 248.

[8] Abigail Adams to her sister, Aug. 9, 1789, Mitchell, *op. cit.*, pp. 19–20.

[9] Wingate, *op. cit.*, II, 274, citing letter Mrs. William S. Smith to her mother, Abigail Adams, no date shown.

[10] Maclay, *op. cit.*, pp. 202, 254–255, 272, 284, 293, 309–310, 332–333. Maclay does not give the impression that the Pennsylvanians' meetings were considered an unusual practice.

[11] *Ibid.*, pp. 14–15, 43, entries for May 3 and 19, 1789. Maclay's spelling of his colleagues' names was often quite informal.

Many Members of Congress professed to dislike New York as the National Capital. Some complained of what they considered the oppressively high cost of living, others of the heat, others of the all-too-prevalent sickness.[12] More democratic Members feared that the friendly attentions of New York's "first people" were downright pernicious; they considered the city's loyalist record and British ideas of dress, rank, and salaries a bad influence on the Congress of a Republic.[13]

However, when Congress decided to leave New York, the extent of the city's hospitality was a minor factor. Sectional politics were the prime consideration. The activities of Senator Robert Morris were considered particularly effective, the cartoons of the day picturing him carrying Congress out of the city on his own broad shoulders. The details of the famous "bargain" involving Hamilton and Jefferson were apparently not widely known at the time.

But the parting was amicable. In August 1790 the Senate thanked the corporation of the city of New York for the "elegant and convenient accommodations" and presented to the city the furnishings in the city hall which had been added by Congress.[14]

THE SENATE IN PHILADELPHIA

Meanwhile, the city of Philadelphia had busied itself making ready handsome facilities for the use of Congress. The new county courthouse, a plain brick building surmounted by a cupola, the construction of which was begun in 1787 and finished in February 1789, was altered and apparently enlarged for the use of the Federal legislators. This building, in which Congress met for 10 years and which became known as "Congress Hall," is located on the southeast corner of Sixth and Chestnut Streets. It is now restored to appear as it did when Senators and Representatives in knee breeches and cocked hats debated Hamiltonian finance there. A contemporary cut shows it as a part of the first "civic center" in America. The Episcopal Academy was located on one side and the State House on the other. Also included in the group of buildings was that of the Philosophical Society and of the Philadelphia Library. Nearby is Independence Hall. Presidents Washington and Adams resided, in turn, in Robert Morris' mansion on Market Street, only a short distance away.

The House of Representatives met in the large Chamber which occupied almost the entire first floor. A vestibule for visitors extended in both directions from the entrance on Chestnut Street. From this lobby stairways ascended to the second floor, where the Senators met. While filing through this vestibule, Members were apt to be accosted by constituents or others interested in measures before Congress.

The Senators met in the Chamber on the south end of the second story, which also contained smaller rooms for the use of officers and committees of Congress. The Senate Chamber overlooked the State House garden. If business became too tedious, Members could stroll through these gardens and see the strange birds at C. W. Peale's noteworthy museum.

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[12] Letter, R. H. Lee to Samuel Adams, Aug. 8, 1789, Ballagh, *op. cit.*, II, 497; letter, Lee to Thomas L. Shippen, May 15, 1790, *ibid.*, II, 515; letter, Paine Wingate to Timothy Pickering, Apr. 29, 1789, Wingate, *op. cit.*, II, 303.

[13] Margaret Woodbury, *Public Opinion in Philadelphia, 1789–1801* (Durham, N.C.: Seeman Printery, 1919), p. 108. This is a Ph. D. dissertation, Bryn Mawr College.

[14] *Senate Journal*, 1st Cong., 2d sess., Aug. 12, 1790, p. 212.

> In a very plain chair, without canopy, and with a small mahogany table before him, festooned at the sides and front with green silk, Mr. Adams, the Vice-President, presided as president of the Senate, facing the north.

Facing the Vice President, apparently arranged in semicircles, were the handsome mahogany chairs of the Senators. When a Senate gallery was finally constructed, it was located on the north side of the Chamber, behind the Senators.[15]

Members of Congress often found private lodging hard to locate in Philadelphia. Accommodations had to be reserved well in advance of the opening of a new session. Influx of Senators, Representatives, executive officers, and employees, and personnel of the new Bank of the United States strained the housing facilities of the city.[16] Members who did not bring their families preferred boardinghouses; those who did faced the even more difficult task of finding larger quarters. Occasionally two congressional families joined in renting a house. Three months before Congress was due to convene in December 1793, Senator James Monroe wrote to his Virginia colleague, Senator John Taylor of Caroline:

> I must request information whether you take yr. family to Phila. and intend to take part of our house or not. I think it will accommodate us fully and the arrangement will be very agreeable to us. But if you are fearful we and our families cannot live in peace together, and that disputes may take place abt. the furniture, the wood, the servants, the rate of expenses, etc. upon which the best of friends sometimes, after being at first only cool and reserved, break out into open rupture, say so. In that case I advise you to procure immediately other accommodations as they will be scarce and difficult to be procured. I wish your decision at present only upon acct. of our friend, Mr. Madison to whom I have agreed to furnish a room or two in case you prefer separate quarters.[17]

As far as the cost of living was concerned, some Members of Congress felt that Philadelphia was no improvement over New York. There were the usual complaints of overcharges and sharp practices at the Members' expense. "One would suppose that the people thot Mexico was before them, and that Congress were the possessors," wrote the Vice President's wife in 1790.[18] However, Maclay paid only $3 per week board and lodging at Philadelphia, compared to $4 per week at New York.[19] Senator Paine Wingate (himself a former Congregational clergyman) enjoyed "congenial and comfortable quarters" at the home of the Reverend Dr. William Smith, Episcopalian clergyman, who had just retired as provost of the College of Philadelphia. Also residing at Dr. Smith's were Roger Sherman, then a Representative from Connecticut, Representative Benjamin Goodhue of Massachusetts, and later Timothy Pickering, Postmaster General.[20]

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[15] On the basis of a contemporary memorandum by Senator Roger Sherman which he discovered and published a hundred years later, Senator George F. Hoar suggested that the seating of the Senators was determined by their length of service with the Federal Government. However, a comparison of the Senators' Federal service and the seating arrangement shown in Sherman's memorandum shows little or no correlation between the two. See Charles E. L. Wingate's comments in Wingate, *op. cit.*, II, 283. Senator W. A. Peffer stated that in 1789 at New York the Senators by agreement arranged themselves in a semicircle in front of the Presiding Officer, beginning on the right with the Members from New Hampshire and ending on the left with those from Georgia. However, he cited no authority. See W. A. Peffer, "The United States Senate: Its Privileges, Powers, and Functions, Its Rules and Methods of Doing Business," *North American Review*, CLXVII (August 1898), pp. 176–190. This article contains a number of errors. Maclay gave the impression that Senators chose seats at random. See his entry for Sept. 22, 1789, Maclay, *op. cit.*, p. 158.

For descriptions of Congress Hall, see Joseph Jackson, *Encyclopedia of Philadelphia* (Harrisburg: National Historical Association, 1931), II, 514–516; James Schouler, *History of the United States of America Under the Constitution* (New York: Dodd, Mead & Co., 1880–99), I, 352–353; John F. Watson, *Annals of Philadelphia and Pennsylvania*, enlarged and revised by Willis P. Hazard (Philadelphia: Edwin S. Stuart, 1899), III, 884 ff. Watson was 21 years old when the Government moved from Philadelphia. His descriptions of Philadelphia in the 1790's were based on personal recollections and on the reminiscences of William McKoy (elsewhere sometimes shown as "McKay"), the first teller of the Bank of America in Philadelphia, who in 1828–29 wrote a series of antiquarian articles in *Poulson's American Daily Advertiser*. The quotation describing the Vice President's chair given above, as well as the description of the Senate in session shown below, are from the pen of McKoy, who was an eyewitness to the scenes he described.

[16] Letter, Senator Caleb Strong to David Sewall, Oct. 29, 1791, *Massachusetts Historical Society Proceedings*, XLV (October 1911), 24.

[17] Letter, Monroe to Taylor, Aug. 29, 1793, *Massachusetts Historical Society Proceedings*, XLII (May 1909), 321–322.

Two other Senators had no difficulty in finding living quarters at Philadelphia—Senators Robert Morris and William Bingham of Pennsylvania. Morris and Bingham had both city and country residences which rivaled the most splendid establishments of the Old World. These became the centers of much of the opulent and extravagant entertainment which characterized life in the city while it was the National Capital.

Other scenes of refined entertainment were the townhouse and baronial country seat of Benjamin Chew, member of one of the leading Philadelphia families, who was the father-in-law of Senator John Eager Howard of Maryland. Senator Pierce Butler of South Carolina, described as "a Democrat but no democrat," also maintained a lavish establishment in the Capital, where the southerners in Congress were often entertained. Aaron Burr, as a Senator from 1791 to 1797, "lived in style, and gave elegant entertainments, but his associates were chiefly politicians," wrote Rufus Wilmot Griswold, whose preference for the "best families" of Philadelphia was rather obvious.[21]

Despite the pressure of the grave problems—which hung heavy over the Nation in the 1790's—or possibly because of them—social Philadelphia wore an air of gaiety quite out of keeping with the Quaker simplicity upon which the city was founded. Abigail Adams, of more frugal New England, was impressed:

> [Philadelphia in winter is] one continued scene of Parties upon Parties, Balls and entertainments equal to any European city. The Publick amusements 'tis True are few. No Theatre here this winter * * * an assembly once a fortnight, to which I have not been this season, but the more general Method for those who have Houses calculated for it, is to give Balls at their own Houses.[22]

In this lavish social life the Senators had a full share—in fact, too large a share, according to one of the Senators from New Jersey, who in 1796 wrote to his wife:

> There is more gayety here than I wish to partake of—I feel myself in fashion contrary to my own inclination. I was last night at a splendid party at Dickinsons' in his new house. About fifty ladies present, and as many gentlemen, three rooms open * * *.[23]

With the appearance of political parties, sharply divided on both foreign and domestic policy, social life at Philadelphia polarized along party lines. Federalist Senators and Representatives thus came to monopolize the guest lists of the "first families" of the city, who were universally Federalist. Republicans more often gathered in the homes of leaders such as Jefferson or Butler. This division along party lines was so sharp that even two such prominent leaders as Oliver Ellsworth, most active of the Federalist leaders in the Senate, and James Madison, Republican leader of the House, had little social life in common. Being asked, near the close of his life, to furnish some biographical material concerning Ellsworth, Madison replied that "as we happened to be thrown but little into the familiar situations which develop the features of personal and social character, I can say nothing particular as to either * * *."[24]

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[18] Letter, Abigail Adams to her daughter, Nov. 21, 1791, Charles Francis Adams (ed.), *Letters of Mrs. Adams, the Wife of John Adams* (4th ed.; Boston: Wilkins, Carter & Co. 1848), pp 349–350.

[19] Maclay, *op. cit.*, pp. 333, 352.

[20] Wingate, *op. cit.*, II, 379–380.

[21] Griswold, *op. cit.*, pp. 264, 291, 297, 315, 321, 327, 395, 399, and *passim*.

[22] Letter, Abigail Adams to her sister, Feb. 5, 1792, Mitchell, *op. cit.*, p. 77.

[23] "Letter of a New Jersey Senator to his Wife," *Magazine of American History*, X (December 1883), 509–510. This Senator must have been either John Rutherford, Frederick Frelinghuysen, or Richard Stockton.

After Hamilton's retirement from the Treasury Department, Federalist Members of both Houses often congregated at the home of his successor, Oliver Wolcott, Jr. This social circle was enthusiastically described in a later year by Joseph Hopkinson, Philadelphia lawyer and Federalist leader of the time:

> During his [Wolcott's] residence in Philadelphia, the division of political parties in their social intercourse was more decided than it has even been since. His associates, therefore, were almost exclusively with the federal members of the administration and of Congress, together with families residing in the city, of the same party, which then certainly constituted the best society of the city. In his parlor, of an evening, you would meet more or less company of that description. Leading members of the Senate and House of Representatives, especially from New England, were habitually there, and sometimes at my house. When I mention such names as Ellsworth, Ames, Griswold, Goodrich, Tracy &c. you may imagine what a rich and intellectual society it was.

This social division according to party label was not complete, however. Senator James Monroe, Republican stalwart, was a guest of the Binghams, at whose palatial residence he ruffled the social waters by shouting, when a uniformed lackey called out his name upon arrival, "Coming, as soon as I get off my greatcoat!"[25]

Since Federalist strength was concentrated in New England and Republican strength in the South, social activities also tended to have a sectional flavor. There were some exceptions, however. For instance, Senator John Langdon, of New Hampshire, when he first came to the Senate in 1789, shared quarters at 37 Broad Street in New York with Senators Paine Wingate and Tristram Dalton and Representative Samuel Livermore, all New Englanders and all sharing Langdon's Federalist orientation. However, as time went on, Langdon drifted into the Republican camp, identifying himself socially as well as politically with the opponents of the administration. To be more exact, he joined a group of southern Republicans who took their meals at Marache's on Philadelphia's North Fourth Street in forming an eating club which they called "Marache's Club," with Langdon as president. The group, which included Representatives John Randolph, of Virginia, Nathaniel Macon, of North Carolina, and Joseph H. Nicholson, of Maryland, sat around the club's table discussing the follies of the Federalist Party and scheming its downfall.[26]

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[24] Letter, Madison to James Wood, Feb. 27, 1836, *Letters and Other Writings of James Madison*, published by order of Congress (Philadelphia: J. B. Lippincott & Co., 1865), IV, 427.

[25] Hopkinson's description is cited from Gibbs, *op. cit.*, I, 162–163. Hopkinson won fame in 1798 when he wrote the words of "Hail, Columbia!" to help unite the Nation against the threat from France. The Monroe anecdote is given in Arthur Styron's *Last of the Cocked Hats* (Norman: University of Oklahoma Press, 1945), p. 152.

[26] Griswold, *op. cit.*, p. 166 fn, citing *New York Register, 1789*; Lawrence Shaw Mayo, *John Langdon of New Hampshire* (Concord, N.H.: Rumford Press, 1937), p. 275, citing William Cabell Bruce, *John Randolph of Roanoke*, II, 600–601.

Party divisions did not reach the diners at the President's residence, however. John Adams—adopting Washington's practice of striking the golden mean between ostentation and undignified informality—continued the custom of each session inviting the Senators and Representatives to dinners where Republican met Federalist without regard to party affiliation.

One uninvited guest in Philadelphia who cared nothing for party lines was the dread yellow fever, which thrice struck the city with deadly force during the period Congress met there. In 1793 the epidemic was so severe that Government officers were forced to leave the city and Washington sought advice concerning the legality of convening the first session of the Third Congress elsewhere, perhaps at nearby Germantown. Fortunately, the fever had so abated by December that this was not necessary.[27]

In 1797 the "malignant fever" struck the capital city again. In the autumn, President Adams, armed with a 1794 act authorizing him to convene Congress at a place other than the Capital, considered the possibility of convening the second session of the Fifth Congress at New York. He feared that if Congress met at Philadelphia, infected people would fill the galleries and also that New England Members would be so averse to going to the Capital that no quorum would be achieved until long after the meeting date. However, again abatement of the epidemic made it unnecessary to change the place of meeting.[28]

The following year the dreaded visitor returned, not only to Philadelphia but to other coastal cities, bringing death and suffering equal to the great epidemic of 1793. It was reported that 70 persons were cut down daily in the stricken Capital. Among the victims were the bitter newspaper rivals, Bache of the *Aurora* and Fenno of the *Gazette of the United States*. During the recess of Congress most of the public offices were moved to Trenton. But again, as in other years, cooler weather brought relief, and Congress was able to round out its scheduled 10 years at Philadelphia.[29]

The Senate in Washington, D.C.

Himself anticipating the removal of the National Capital to the banks of the Potomac, Vice President Jefferson in 1798 charged that Adams and the Federalists in Congress were violently opposed to transfer of the Capital to the new city in the wilderness. He claimed they even toyed with the possibility of merely going through the formality of moving the Government there in order to comply with the law—and then moving right out again. He declared that Senators Sedgwick of Massachusetts and Hillhouse of Connecticut bitterly fought the bill for construction of Government buildings in Washington and that the Members he accused of intending a quick move away from the new capital did not disavow it.[30] However, the Senate's

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[27] See numerous Washington letters in Fitzpatrick, *Writings of Washington*, XXXIII, 108–130.

[28] Adams to Pickering and Wolcott, Oct. 12, 14, 20, 27, 1797, Adams *Works*, VIII, 552 ff.; Wolcott to Adams, Sept. 26, 1797, Gibbs, *op. cit.*, I, 564; Adams to Wolcott, Oct. 26, 1797, *ibid.*, I, 572.

[29] Letter, Robert Troup to Rufus King, Aug. 16, 1798, King, *op. cit.*, II, 391; King to Senator Bingham, Dec. 8, 1798, *ibid.*, II, 479.

[30] Letters, Jefferson to Madison, Mar. 29 and Apr. 5, 1798, Lipscomb, *op. cit.*, X, 18–22.

Federalist majority passed, and Adams signed, the construction bill. Two years later the bill authorizing the actual move to the new Capital became law.

Among other provisions of this legislation was one authorizing an expenditure of $9,000 for furnishing the new Senate and House Chambers, offices, and committee rooms, and for moving the records, books, and papers to the new Capital. Of great significance for the future was the provision authorizing the expenditure of another $5,000 for augmenting the number of books in the collection of Congress and for furnishing the library to house them. These purchases were to be made by the Secretary of the Senate and the Clerk of the House under the direction of a joint Senate-House committee.[31]

A heavy snow fell on the woods, fields, and unfinished buildings of Washington as the Senate struggled to obtain its first quorum in the new Capital.[32] The Senators, as they formed a quorum only 4 days late—surprising, in view of the difficulty of travel to the Federal city—found prepared for them in the partly completed, domeless Capitol a Chamber befitting the dignity of their office.

Although smaller than the room they left at Philadelphia, the new Chamber was impressive for its dignity and refinement. It was 86 feet long and 40 feet wide. Encircling the Senators' seats was an arcade, with 16 paneled piers and molded capitals. The floor of the Chamber was originally on the ground level, so that the gallery resting on the arcade was on the same level as the main floor of the building. Above the Senate Chamber was a large room on the attic floor for clerks. In 1809, apparently at Jefferson's suggestion, the Chamber floor was raised to the level of the gallery and the clerks' room was removed, so that the Chamber ceiling was carried up to the roofline. The space below the Senate then became the Supreme Court's chamber, where many of John Marshall's famous opinions were delivered. The Senate moved to its present Chamber in the newly completed north wing of the Capitol in 1859. At that time the Supreme Court took over the Chamber in which the Senate reached the zenith of its fame.[33]

Since only the north side of the central portion of the Capitol building was completed when the Members of Congress arrived in November 1800, both Houses were forced to use that part of the building. Secretary of the Treasury Oliver Wolcott, looking over these accommodations a few months earlier, found the temporary House quarters "inelegant" but the Senate Chamber "magnificent in height, and decorated in a grand style."[34] As President Adams delivered his address to Congress on November 22, the portraits of Louis XVI and Marie Antoinette which had been presented to the Continental Congress by Louis in 1784 looked down upon a Chamber so crowded that the ladies overflowed the gallery and sat and stood on the main floor occupied by the Senators.[35]

The Senators must have found the new Chamber a chilly place, because less than a month later they ordered the Doorkeeper to procure and install "two stoves, with suitable apparatus" for their comfort.

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[31] *Annals*, 6th Cong., appendix, pp. 1494–1495.

[32] *National Intelligencer* (Washington, D.C.), Nov. 21, 1800.

[33] Haynes, *Senate of the United States*, II, 915–917.

[34] Letter, Wolcott to his wife, July 4, 1800, Gibbs, *op. cit.*, II, 876–877.

[35] Entry dated Nov. 22, 1800, "Diary of Mrs. William Thornton, 1800–1863," *Records of the Columbia Historical Society*, X (1907), 214. Mrs. Thornton was the wife of the Architect of the Capitol.

Other facilities appear to have been more than adequate, because a few weeks later the Senate resolved to turn one of its committee rooms over to the U.S. Supreme Court, which was without quarters of its own.[36]

The cries of "aristocracy" which had resounded in senatorial ears in Philadelphia followed the Senators even here. For the plush red chairs of the Senate Chamber it had been thought necessary to send to the West Indies for mahogany, to London for red morocco or goatskins, and to Birmingham for nails. What was the advantage of these gaudy fixtures? Did Senators fly to their glittering chairs with more ardor than the Representatives did to their plainer seats? Two words only could account for the exotic quality of those red chairs—"British influence." The extravagant furnishings of the Senate were all part of a dark plot to destroy the American Republic and promote British manufactures! [37]

Wolcott, having moved to Washington about 4 months before Congress was due to meet there, found a good tavern about 40 rods from the Capitol and a few more houses under construction in the vicinity, but could not see how the Senators and House Members could possibly secure lodgings—

> unless they will consent to live like scholars in a college, or monks in a monastery, crowded ten or twenty in one house, and utterly secluded from society. The only resource for such as wish to live comfortably will, I think, be found in Georgetown, three miles distant, over as bad a road, in winter, as the clay grounds near Hartford.[38]

The Members of Congress did, indeed, have to live like monks or scholars. Most of them lodged two to a room in the numerous boardinghouses which had been established by enterprising citizens on or near Capitol Hill. Describing such a "congressional mess" in which he lived with seven other Members of Congress, Representative Manasseh Cutler of Massachusetts remarked that "in each chamber are two narrow field beds and field curtains, with every necessary convenience for the boarders." [39] In recognition of the dignity of his office, Speaker Theodore Sedgwick was allowed a room by himself. Vice President Jefferson enjoyed even greater comfort, for he boasted a parlor or sitting room in addition to a bedroom by himself at Conrad & McMunn's hostelry, which offered rooms for both stage passengers and boarders about 200 paces from the Capitol.[40] The lodgings in old, established Georgetown were of a superior order and attracted a number of Members, chiefly southerners. But even in the areas which had recently been wilderness, the rooms were spacious and the meals good, so that living under such conditions was not disagreeable.[41]

Jefferson (who may have been a little prejudiced in favor of the Potomac city) declared that the Members were well accommodated, and those who lived in Georgetown did so only by choice, since there were lodgings to be found on Capitol Hill if Members had preferred them. By this time there was "not a whisper or thought in any mortal" of attempting to move the Capital again.[42]

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[36] *Senate Journals*, 6th Cong., 2d sess., Dec. 17, 1800, and Jan. 21, 1801, pp. 30 ff.

[37] *Aurora*, Nov. 28, 1800, quoting Baltimore *American*, n. d.

[38] Letter, Wolcott to his wife, July 4, 1800, Gibbs, *op. cit.*, II, 376–377.

[39] Letter, Cutler to his daughter, Betsy, Dec. 21, 1801, quoted by John Ball Osborne, "The Removal of the Government to Washington," *Records of the Columbia Historical Society*, III (1900), 158–159.

[40] *National Intelligencer*, Nov. 28, 1800, and Feb. 18, 1801.

[41] Wilhelmus Bogart Byran, *A History of the National Capital* (New York: MacMillan Co., 1914), I, 379–380. Bryan cited Mrs. Samuel Harrison Smith's reminiscences, *First Forty Years of Washington Society*, p. 12, and *Correspondence and Miscellanies of John Cotton Smith*, p. 208.

Even amusements were available on Capitol Hill. The Capitol Hill Tavern boasted shuffleboard and a ninepin alley, while even as late as 1806 quails and other birds were shot within a hundred yards of the Capitol. Construction of new buildings progressed at a rapid pace, and although roads remained bad and only distances magnificent, housing became more and more plentiful.[43]

Even the Federalist Members of Congress soon adjusted themselves to the new surroundings. February 1801, found them giving a "splendid entertainment" at a local hotel to honor Oliver Wolcott on his retirement from the Treasury, Senator James Ross of Pennsylvania serving as toastmaster.[44] The Presidential levee was soon resumed. Yet, social life in the rural, half-finished Capital for years to come was to remain a far cry from the elegant and lavish dinner parties of urbane Philadelphia.

THE SENATE STAFF

The Secretary of the Senate during this entire period was the affable Samuel Allyne Otis, son of James Otis of writ-of-assistance fame and father of the Federalist House leader, Harrison Gray Otis. The Secretary, a close friend of Vice President Adams, had previously been a Boston merchant, speaker of his State's lower house, and a delegate to the Congress of the Confederation in its last year.

Otis, probably because of his close association with Adams, incurred the bitter dislike of Senator Maclay, who abhorred the manner in which he kept the *Senate Journal* and who denounced him for lack of candor.[45] However, the Secretary seems to have served to the satisfaction of the other Senators, even the Republicans, for they kept him in office year after year until his death in 1814. One biographical sketch claims that Otis was not absent from his duties a single day during his entire period of service.[46] The salary assigned him and the Clerk of the House in 1789 was $1,500 yearly. The Secretary's office staff included a principal clerk and an engrossing clerk.[47]

Chief Senate Doorkeeper during the period was James Mathers, who was given the additional duty of Senate Sergeant at Arms during the William Blount impeachment proceedings. He was assisted by a messenger—after 1798 James Mathers, Jr.—and by a second assistant who was engaged in 1792 to make the fires, carry wood, and perform other odd jobs in the Senate Chamber, at wages of 50 cents per day. When Congress moved to the rural hilltop overlooking the Potomac,

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[42] Letters, Jefferson to Thomas Mann Randolph, Nov. 30, 1800 and Dec. 5, 1800, Lipscomb, *op. cit.*, XVIII, 225–227.

[43] Ainsworth R. Spofford, "The Coming of the White Man, and the Founding of the National Capital," *Celebration of the One Hundredth Anniversary of the Establishment of the Seat of Government in the District of Columbia*, compiled by William V. Cox (Washington: Government Printing Office, 1901), pp. 234, 235, 239, 240.

For further descriptions of the removal of the Capital to Washington, see the following articles in the same publication: Ainsworth R. Spofford, "Removal of the Government to the District of Columbia in 1800," pp. 243–252, and W. B. Bryan, "Removal of the Seat of Government to Washington," pp. 253–261.

[44] *National Intelligencer*, Feb. 6, 1801.

[45] Maclay, *op. cit.*, *passim*.

[46] "Samuel Allyne Otis," *National Cyclopedia of American Biography*, II, 500.

[47] *Senate Journal*, 1st Cong., 1st sess., Aug. 28, 1789, p. 111; 4th Cong., 1st sess., June 1, 1796, p. 344.

Mathers, Sr., was authorized to employ not only these two assistants but also two horses, for which purpose $28 per week was provided.[48]

Either the Secretary and Doorkeeper considered Congress niggardly in fixing their compensation or the expenses connected with their offices were higher than expected, because the *Journal* shows several requests for augmentation of their pay, some of which were agreed to. These men did not have to face reappointment at the beginning of each new Congress, however, since the Senate considered itself a continuing body.[49]

When the First Congress was organized in 1789, the Senate and House adopted the practice of electing two chaplains of different denominations, the Senate choosing one and the House the other. These clergymen alternated weekly between the two Houses in offering the daily prayers, although each was invariably known as the Chaplain of the Chamber which elected him. It became the custom to conduct these elections at the beginning of each session.

At New York the Senate chose the Right Reverend Dr. Samuel Provoost, thus inaugurating the custom, which was adhered to throughout the period, of choosing as Senate Chaplain the Protestant Episcopal bishop of the diocese in which the Capital was variously located. The erudite Dr. Provoost had espoused the patriot cause in the Revolution, served as Chaplain of the Continental Congress at New York, and in 1786 was consecrated first Episcopal bishop of the New York diocese. The House named the eloquent Rev. William Linn, pastor of the Collegiate Dutch Church of New York City, who later served as president of Queens (Rutgers) College.[50]

Throughout the stay of Congress at Philadelphia the Senate's choice was the Right Reverend Dr. William White, leader in the reorganization of the Anglican into the Protestant Episcopal Church after the Revolution. He was a man of strong Federalist convictions, which he did not hesitate to express on occasion. However, he seems to have taken little part in purely political controversies, but was credited with having exerted considerable influence on Members of Congress through his close association with many of them and through his quiet counsel.[51]

The choice of the House in 1790 was the Reverend Dr. Samuel Blair, scholarly Presbyterian minister who served several terms in the Pennsylvania Assembly. The following year, and throughout the remainder of Congress' stay at Philadelphia, the House's choice was the Reverend Ashbel Green, "Old School" pastor of the city's Second Presbyterian Church and afterward president of the College of New Jersey. In 1796 many of the House Members preferred the controversial Unitarian chemist-theologian, Dr. Joseph Priestley, but the Reverend Mr. Green finally won by a 35-to-27 vote.[52]

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[48] *Ibid.*, 1st Cong., 1st sess., Apr. 7 and 8, 1789, pp. 9–10; 2d Cong., 2d sess., Nov. 26, 1792, p. 17; 5th Cong., 2d sess., Feb. 5, 1798, p. 95; 6th Cong., 2d sess., Nov. 24, 1800, p. 15.

[49] *Ibid., passim.*

[50] "Samuel Provoost," *National Cyclopedia of American Biography*, I, 513–514; "William Linn," *ibid.*, III, 399–400.

[51] "William White," *Dictionary of American Biography*, XX, 121–122; Julius Hammond Ward, *Life and Times of Bishop White* (New York: Dodd, Mead & Co., 1892), p. 71.

[52] "Samuel Blair," *National Cyclopedia of American Biography*, IX, 327; "Ashbel Green," *ibid.*, V, 467; *Annals*, 4th Cong., 2d sess., Dec. 12, 1796, p. 1601. For the other chaplain elections, see *Annals, passim.*

When Congress moved to Washington, the House attempted to discontinue the rule that the chaplains had to be of two different denominations. The Senate insisted on retaining it, however, and the House finally agreed, but only by the narrow vote of 36 to 34. The Senate thereupon elected the Right Reverend Bishop Thomas John Claggett, first Protestant Episcopal bishop of Maryland, and the House the 25-year-old Rev. Thomas Lyell, Methodist minister of nearby Virginia, who later became the Episcopal rector of Christ Church in New York City, a post he held for 40 years.[53]

The cost of conducting each session of Congress during these early years never far exceeded $200,000—an outrageous sum, in the opinion of some critics. This amount included salaries of the Members, officers, and attendants, as well as firewood, stationery, printing, and other contingent expenses. It also covered the cost of the three newspapers which each Member received at Government expense.[54]

It did not, however, include the cost of franking the members' mail. Senators and Representatives from the very beginning enjoyed the franking privilege, and it was charged then, as now, that the privilege was abused. The *Aurora* in 1795 claimed that some Members in a single mail had sent out "from 100 to 400 letters"—a charge that was probably true since many Members considered it their duty, or good politics, to send their constituents accounts of their stewardship in Congress. Critics also charged that some Members sent shirts, handkerchiefs, and similar items under the frank.[55]

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[53] "Thomas John Claggett," *Appleton's Cyclopaedia of American Biography*, I, 618–619; "Thomas Lyell," *ibid.*, IV, 58; *Annals*, 6th Cong., 2d sess., Nov. 26, 1800, p. 789.

[54] See the annual appropriation acts in the appendixes to the *Annals* for each session.

[55] *Aurora*, Aug. 25, 1795.

CHAPTER XII

MODUS OPERANDI

THE SENATE'S FIRST STANDING RULES

In describing the activities of legislative bodies, historians are apt to ignore methods of procedure as more or less necessary impediments in favor of the *content* of legislative enactments or possibly the colorful careers of outstanding members. However, occasionally a dramatic filibuster or bit of adroit parliamentary legerdemain brings to light the rather obscure truth that *what* a parliamentary body does often depends in large measure on *how* it conducts its deliberations. The best efforts of a new legislative chamber are required to devise effective machinery for finding and expressing the will of the majority.

During the very time when the American Congress was adopting and abiding by orderly procedures, the Assembly of revolutionary France was handicapped by frequent wild confusion within its chamber. A hundred members addressed, or tried to address, the house at the same time. The authority of the presiding officer was disregarded. Spectators in the galleries hissed, applauded, and intimidated the members. On occasion, Paris agitators even entered the floor of the chamber. Many of the rash measures of the Assembly could no doubt have been averted had intelligent rules of order been enforced within the chamber and the members protected against outside pressures.[1]

Fortunately for popular government in the United States, the Members of the First Congress were of a political temper fashioned by centuries of orderly legislative precedent in England and America. By them, adherence to such orderly procedures was taken for granted and only occasionally and momentarily departed from.

The framers of the Constitution considered it necessary to lay down only a handful of rules for the internal procedures of Congress. Those affecting the Senate provided that:

> The Vice President of the United States was to be President of the Senate;
>
> The Senate could choose its other officers, including a President *pro tempore;*
>
> The Chief Justice was to preside over impeachment trials;
>
> Congress was to assemble at least once each year;
>
> A majority of the Members was to constitute a quorum, but a minority could compel attendance of absentees;
>
> Each House was to judge the eligibility of its own Members;

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[1] Robert Luce, *Legislative Procedure* (Boston: Houghton Mifflin Co., 1922), p. 1.

A two-thirds vote was necessary to convict in impeachment trials, to expel a Member, to pass a bill over the President's veto, and to approve treaties;

Each House was to keep a journal of its own proceedings, which was to be published from time to time;

Neither House could adjourn for more than 3 days without the consent of the other;

The "yeas" and "nays" must be entered in the Journal at the request of one-fifth of the Members present.

Beyond these requirements, the Senate was free to adopt such rules as it saw fit.[2]

From the very first, the human quality "in a sense alien altogether to government," in the words of William S. White,[3] was quite characteristic of the Senate. As the smaller, and more self-disciplined, of the two Houses of Congress, the upper Chamber at the very beginning adopted a policy of keeping formal rules to a minimum. The first session adopted only 20 short rules. This list had grown to 40 by 1806, but neither the revision of that year nor any of the subsequent revisions was occasioned by an urgent spirit of revolt or reform. In fact, the gist of all but three of the original short rules adopted in the spring of 1789 still remains in very similar wording.[4]

Adoption of standing rules of order was a first order of business in the Senate's first session. On April 7, the day after a quorum had finally been obtained, Senators Oliver Ellsworth, Richard Henry Lee, Caleb Strong, William Maclay, and Richard Bassett were appointed a committee to work with a House delegation to prepare rules for the government of the two Houses in conference and for selection of chaplains. This same committee was also to prepare rules for conducting the business of the Senate.[5]

The composition of this committee is worthy of note.

Lee had been a member of colonial Virginia's House of Burgesses and of the State assembly. He had served on 100 of the Continental Congress' committees, and had at one time been President of that body.

Ellsworth had been a member of the Connecticut General Assembly and of the Governor's council. He had served in the Continental Congress for 7 years and had been a prominent member of the Federal Constitutional Convention.

Strong had been a member of both the upper and lower houses of the Massachusetts Legislature. He, too, had been a delegate to the Constitutional Convention.

Maclay had served a single term in the Pennsylvania Legislature, and had been a member of that State's supreme executive council.

Bassett had been for 10 years a member of the Governor's council in Delaware, and had also been a member of the Philadelphia convention.[6]

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[2] United States Constitution, art. I, secs. 3 to 7, art. II, sec. 2. These provisions are here paraphrased.

[3] William S. White, *op. cit.*, p. 3.

[4] Haynes, *Senate of the U.S.*, I, 341–342.

[5] *Annals*, 1st Cong., 1st sess., Apr. 7, 1789, pp. 18–21.

[6] *National Cyclopedia of American Biography, passim.*

It will thus be seen that the five-man committee enjoyed a background of service in the legislatures of five different States, the procedures of all of which were heavily indebted to the English Parliament. Two had served in the Continental Congress, which was also indebted to English precedents, and which had grappled with many of the same problems which would now confront the Senate. Three had participated in the Constitutional Convention and presumably had inside knowledge as to the kind of body the framers had had in mind when they established the Senate. All five were lawyers.

There is no known record of the committee's deliberations, but 9 days after its appointment it presented to the Senate 19 standing rules. These were all adopted, apparently without amendment, the same day. Two days later, a 20th rule was added.[7]

Attached to the *Journal of William Maclay*, which was jealously guarded from public scrutiny for nearly a hundred years by the Senator's descendants, was a list of 16 rules under the heading, "The Rules of Proceedings for the First United States Senate." When this *Journal* with its accompanying rules was finally made public, the latter caused considerable confusion because they differed radically in many instances from those published in the *Annals of Congress.* For example, Maclay's "Rule XII" provided that committee chairmen should always be from the "*most northerly State*" represented on the committee, while his "Rule XVI" provided that every Senator who should absent himself without leave for more than *15 minutes* after a quorum was formed should be considered guilty of disorderly behavior and should have his name and the nature of his offense written on a slip of paper and attached to a copy of the rules hung "in some conspicuous part of the Senate Chamber."[8]

It is now generally agreed that the Maclay "rules" were never adopted by the Senate, but were merely that irascible Pennsylvanian's ideas of what the rules should be. However, a comparison of the Maclay suggestions and the rules actually adopted reveals many similarities, due either to Maclay's influence on the committee or a similarity of ideas among the members of the committee.

A comparison between the Senate rules adopted in 1789 and the rules of the Continental Congress and the Congress of the Confederation reveals that the Senate owes a considerable debt to its oft-despised predecessors. With but few exceptions, the Senate rules were very similar to those of the previous Congresses—in fact, some of them were almost identical in wording. It is, therefore, quite apparent that the Senate committee used the older set of rules as a model while preparing the rules of the new upper Chamber. Here are some examples of the manner in which the Senators followed the rules of the "old" Congress:

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[7] These first rules are shown in the appendix at the end of the present work.

[8] As late as 1953, a prominent authority on Congress accepted this as a rule actually adopted by the Senate; see George B. Galloway, *Legislative Process in Congress* (New York: Thomas Y. Crowell Co., 1953), p. 545. Dr. Galloway accepted the statement of W. A. Peffer in "United States Senate: Its Privileges, etc.," *North American Review,* CLXVII (August 1898), p. 179.

1778 RULES	1789 RULES
3. No member shall read any printed paper in the house during the sitting thereof, without leave of Congress.	
4. No member shall speak to another or otherwise interrupt the business of the house while the journals or public papers are reading for the information of Congress, or when any member is speaking in any debate.	II. No member shall speak to another, or otherwise interrupt the business of the Senate, or read any printed paper while the journals or public papers are reading, or when any member is speaking in any debate.
5. Every member, when he speaks, shall rise from his seat and address himself to the Chair, and when he has finished, shall sit down again.	III. Every member, when he speaks, shall address the Chair standing in his place, and when he has finished shall sit down.
6. No member shall speak more than twice in any one debate the same day, without leave of the house.	IV. No member shall speak more than twice in any one debate on the same day, without leave of the Senate.
7. When two members shall rise together, the President shall name the person to speak.	V. When two members shall rise at the same time, the President shall name the person to speak; but in all cases the person first rising shall speak first.
8. No motion shall be debated until the same be seconded.	VI. No motion shall be debated until the same shall be seconded.
9. When a motion shall be made and seconded, it shall be reduced to writing, if desired by the President or any member, delivered at the table and read by the President, before the same shall be allowed to be debated.	VII. When a motion shall be made and seconded, it shall be reduced to writing, if desired by the President, or any member, delivered in at the table, and read by the President before the same shall be debated.
10. While a question is before the house, no motion shall be received, unless for an amendment, for the previous question, to postpone the consideration of the main question, or to commit it.	VIII. While a question is before the Senate, no motion shall be received unless for an amendment, for the previous question, or for postponing the main question, or to commit, or to adjourn.
11. If a question in debate contains several points, any member may have the same divided.	X. If a question in a debate include several points, any member may have the same divided.
18. No member shall leave Congress without permission of Congress or of his constituents.	XIX. No member shall absent himself from the service of the Senate without leave of the Senate first obtained.

The Senators apparently used as models both the 1778 rules of the Continental Congress and the revised rules of 1781 with later amendments. In some cases the Senate rules were modeled after those of 1781; more often they were modeled after those of earlier years. By 1781 the rules of the Congress of the Confederation included many that governed consideration of executive business which would not be applicable to the Senate. Also, the rules of 1781 were in some cases more lax than those of previous years—for instance, the 1781 rules left out the injunction against members leaving Congress without permission, as well as the prohibition against reading printed matter during sittings. In such cases the Senate committee passed over the 1781 rules and reverted to the stricter rules of the earlier years. On the other hand, the 1781 rules were more specific about calling an erring member to order, and in this case the later rules were followed.

It should be remembered that in 1789 the Senate was no larger than a present-day committee and that its members considered themselves more than mere legislators in the sense of the House of Representatives. They considered themselves an august council of revision and advice; some of them saw themselves as ambassadors of semi-sovereign States.[9]

In framing its rules, such a body quite naturally put a great premium on ease and dignity of speech. At the same time, within the framework of a modest list of rules, these Senators insisted on strictest decorum and attention to business. Thus one-third of their short list of rules dealt with the personal deportment of members during session hours.

During the first session in 1789 there was some confusion in both Houses due to lack of precedents—or difference of opinion as to which precedent should apply—but as time went on complaints on this score subsided. As experience proved the need, the Senate from time to time added further regulations regarding conduct of business. A month after adoption of the standing rules, a resolution was adopted providing that bills on the second reading should be considered "in the same manner as if the Senate were in a committee of the whole, before they shall be taken up and proceeded on by the Senate, agreeably to the standing rules, unless otherwise ordered." Apparently at this stage rule IV, prohibiting a Senator from speaking more than twice in any one debate on the same day, would not apply.[10]

A resolution of the following year provided that members of the majority on any question could move for reconsideration.[11]

At the beginning of the Second Congress a committee composed of Burr of New York, Butler of South Carolina, and Robinson of Vermont was appointed to revise the Senate rules and report necessary alterations or additions.[12] Curiously, two of these three were just beginning their Senate service and presumably would know less about needed changes than their more experienced colleagues. At any rate, there is no record in the *Senate Journal* of this committee suggesting any changes.

In 1798, at a time when numerous unauthorized absences had become particularly obnoxious, the Senate amended its rule XIX to authorize a minority in the absence of a quorum to send the sergeant-at-arms or other designated person after the absent members.[13]

As the 18th century passed into the 19th, the Senate found itself deep in the debate on Adams' convention with France. This issue occasioned adoption of the first standing rules governing detailed procedure on treaties.

The most vigorous controversy in this connection was over a rule of secrecy involving treaty drafts themselves as well as confidential communications from the President. The *National Intelligencer*, Republican organ, stated that opposition to such a rule was based on a belief that the *time* of offering it was improper; although the rule would not apply to the pending treaty, it tended to impeach the conduct of Senators with regard to that treaty, with respect to which no special injunction of secrecy had been made. The *Intelligencer* also claimed that secrecy should not apply unless the President recommended it.[14]

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[9] For the rules of the Continental Congress and the Congress of the Confederation, see *Journals of the Continental Congress*, Sept. 6, 1774, I, 25–26; July 17, 1776, V. 468–474; May 26, 1778, XI, 534–535; May 4, 1781, XX, 476–481, and *passim* for later changes.

[10] *Annals*, 1st Cong., 1st sess., May 21, 1789, p. 40.

[11] *Annals*, 1st Cong., 2d sess., Feb. 25, 1790, p. 31.

[12] *Senate Journal*, 2d Cong., 1st sess., Nov. 1, 1791, p. 23.

[13] *Ibid.*, 5th Cong., 2d sess., June 25, 1798, p. 517.

In spite of such arguments, the Senate adopted a rule to the effect—

> That all confidential communications made by the President of the United States to the Senate, shall be, by the members thereof, kept inviolably secret, and that all treaties which may hereafter be laid before the Senate, shall also be kept secret, until the Senate shall, by their resolution, take off the injunction of secrecy.[15]

Two weeks later a standing rule was adopted covering consideration of treaties in Committee of the Whole and in the Senate proper. Rejection of the convention with France subsequently led to adoption of a rule to the effect that a motion to reconsider a question requiring a two-thirds vote could be adopted by a straight majority. The convention was then reconsidered and approved.[16]

JEFFERSON'S MANUAL

The narrow area of conduct covered by the standing rules adopted by the Senate during this period left a very wide field of decision to its President, especially since rule XVI gave him sole authority to decide questions of order. Such questions were not subject to debate, nor the decisions to appeal. The Presiding Officer needed to call for the sense of the Senate only if there was a "doubt in his mind."

As President of the Senate from 1789 to 1797, Vice President Adams apparently felt that he needed no specific guide on which to base his decisions from the chair on disputed points of procedure, although his diary and other papers reveal that he recognized the practices of the British Parliament as valid precedents.[17] His decisions, nevertheless, appeared to satisfy most of the Members, who, in an affectionate farewell when he left the Senate, adopted a message referring to his "abilities and undeviating impartiality." [18] That there was some criticism of his conduct in the chair, however, is evident from the pages of Maclay's *Journal* and suggested by an unsuccessful effort to recommit the Senate's laudatory farewell message.

Thomas Jefferson, in any event, felt the need of referring "to some known system of rules, that he may neither leave himself free to indulge caprice or passion nor open to the imputation of them." Accordingly, shortly after his election to the chair of the Senate, he set about to collect all pertinent precedents which might be helpful in presiding over that body.[19]

Jefferson had early set out to make himself an expert in parliamentary procedure. When a young lawyer beginning his public career as a member of colonial Virginia's House of Burgesses, he began to note down in a small, leather-bound book the parliamentary rules and precedents in use in that body, which were based on the practice of the British Parliament. He found this little notebook invaluable when, confessedly rusty in parliamentary law after 20 years' absence from deliberative bodies, he assumed the Senate chair. This notebook, however, was hardly sufficient to meet the demands of his office; yet when he looked about for further information, he found that—

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[14] *National Intelligencer,* Dec. 19, 1800.

[15] *Senate Executive Journal,* Dec. 22, 1800, p. 361.

[16] *Ibid.,* Jan. 5 and 6, 1800, p. 365. See also Hayden, *op. cit.,* pp. 126–129. This is a good example of methods of procedure affecting Senate action on an important issue.

[17] For an example, see an Adams diary entry dated Jan. 25, 1790, Adams *Works,* III, 414.

[18] *Annals,* 4th Cong., 2d sess., Feb. 22, 1797, p. 1555.

[19] Preface to *Jefferson's Manual.*

> so little has the Parliamentary branch of the law been attended to, that I not only find no person here, but not even a book to aid me.[20]

Jefferson had been a member of the three-man committee which drew up the 1776 rules of the Continental Congress, many of which found their way into the rules of the Senate. However, he was extremely displeased with the manner in which the precedents had developed in the "old" Congress.

> Their mode of managing the business of the House was not only unparliamentary, but * * * the forms were so awkward and inconvenient that it was impossible sometimes to get at the true sense of the majority.[21]

Jefferson therefore rejected the precedents of that body and set about to refresh and enlarge his knowledge of the British precedents.

A letter to Judge George Wythe, former speaker of the Virginia House of Delegates, whom Jefferson considered the greatest expert on parliamentary law in America, was barren of favorable result. The rules of the British House of Commons which Wythe had collected 30 years previously had been lost among the voluminous papers of the Virginia House of Burgesses. Moreover, wrote Wythe—

> since 1775 i have thought so little of those rules that my memory doeth not enable me to supply such of them as may deserve your attention.[22]

Jefferson continued, however, to collect and digest the pertinent British precedents for his use as the Senate's presiding officer and to collate them with the pertinent provisions of the Constitution and the rules of the Senate, which, of course, applied in case of conflict. Though hardly an Anglophile, he considered the rules and precedents of Parliament—

> as wisely constructed for governing the debates of a deliberative body, and obtaining its true sense, as any which can become known to us * * *.

These rules had the further merits of being widely used in the various States and of appearing in publications open to all. Jefferson found that his use of them in cases where the Constitution and the Senate rules were silent won the full approval of the Senate.[23]

As he occupied the Senate chair from day to day, Jefferson conceived the project of preparing a manual of parliamentary procedure to deposit with the Senate as the standard by which he judged and was willing to be judged. He hoped that such a manual would also be adopted by other legislative bodies and thus help conform their inconsistent and awkward procedures to a common standard.

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[20] Letter Jefferson to George Wythe, Feb. 28, 1800, Lipscomb, *op. cit.*, II, 335 fn.

[21] *Ibid.*, II, 335 fn.

[22] Letter, Jefferson to George Wythe, Jan. 22, 1797, Lipscomb, *op. cit.*, IX, 370; letter, Wythe to Jefferson, Feb. 1, 1797, Jefferson papers, Library of Congress microfilm, No. 34, vol. 101, 17307.

[23] Preface to *Jefferson's Manual.*

For the most salient British rules and precedents he could, and did, refer to the British authorities, particularly John Hatsell.[24] However, these authorities were silent on many minor points such as methods of putting questions and of amending which they considered too commonplace to record. To perfect his knowledge of such points, he wrote again to Judge Wythe as well as to Edmund Pendleton. Both denied having much helpful information on the subject but finally did what they could to clear up doubtful points.[25]

Jefferson had professed opposition to the manual being printed, but just before his term as Vice President was completed the following advertisement appeared in Samuel H. Smith's *National Intelligencer:*

> This day is published by Samuel H. Smith near the Capitol, A Manuel [*sic*] of Parliamentary Practice, For the use of the Senate of the United States. By Thomas Jefferson.[26]

Succeeding generations of parliamentarians have thought highly of Jefferson's workmanship. His *Manual* was not only adopted by the Senate but in 1837 by the House of Representatives as well. In both Houses its rules now govern "in all cases to which they are applicable, and in which they are not inconsistent with the standing rules and orders." It serves as the nucleus of the larger bodies of precedent which have developed since Jefferson's day.[27]

GOOD MANNERS IN THE SENATE

To evaluate standards of conduct in a legislative body is not an easy task. Legislative combat is sure to generate some heat among even the most faultless of gentlemen. Absence of such heat would probably indicate that the legislative body had little power of decision on critical issues.

The latter was certainly not the case in the United States Congress during the 12 crucial years under study. During these years the Members of the Senate and House were forced to make decisions on many fundamental issues dividing the people of the Nation. Bearing this in mind, and comparing their conduct with that of legislators in other parts of the world, Members of the American Congress in this early period gave the world a demonstration of political maturity.

The lower Chamber departed more frequently than the Senate from the established rules of conduct. The *Annals* contain many references to minor disorders, such as shuffling about the Chamber and inattention to the business at hand. On one occasion in 1795, Representative Robert G. Harper felt called upon to move that the committee of the whole rise, since the inattention of the Members made it "a perfect farce" to continue. On another, in 1799, loud conversation, laughs, and coughs prevented Representatives Nicholas and Gallatin from proceeding with speeches against the Alien and Sedition Acts. Sometimes the House galleries by handclapping expressed their approval of developments on the floor. There were references to "nut cracking and apple paring" by Members. A considerable amount of personal vindictiveness was sometimes displayed in debate.[28] A visitor to the gallery remarked that during one debate there was a constant buzz of loud conversation which Speaker Jonathan Dayton's "voice of thunder" could only interrupt for a moment.[29] Finally, there was the Lyon-Griswold fracas, the seriocomic details of which are too widely known to require repetition here.

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[24] John Hatsell, longtime clerk of the House of Commons, published in 1776 *A Collection of Cases of Privilege of Parliament From Earliest Records to the Year 1628*, and in 1781, *Precedents of Proceedings in the House of Commons.*

Just as the English common law was taken over by the American Colonies, so was English parliamentary law taken over by their assemblies. See Luce, *op. cit.*, pp. 14–15. However, procedures in the various assemblies naturally developed differences over the years.

[25] Jefferson to Wythe, Feb. 28, 1800, Lipscomb, *op. cit.*, II, 335 fn.; Jefferson to Pendleton, Apr. 19, 1800, *ibid.*, XVIII, 220–222; Jefferson to Wythe, Apr. 7, 1800, Jefferson papers, Library of Congress microfilm, vol. 106, 18239; Pendleton to Jefferson, June 17, 1800, *ibid.*, vol. 107; preface to *Jefferson's Manual.*

[26] *National Intelligencer*, Feb. 27, 1801.

[27] Luce, *op. cit.*, pp. 15–16. The *Manual*, together with the standing rules and other material pertinent to Senate procedure, forms a part of the *Senate Manual*, published in frequent editions. The whole body of Senate precedents was compiled by Henry H. Gilfry, Chief Clerk of the Senate, and published in 1909 as *Precedents: Decisions on Points of Order with Phraseology in the United States Senate* (Washington: Government Printing Office, 1909).

It should be emphasized, however, that such references by no means paint a well-balanced picture of normal procedures in the lower Chamber. Visitors found the debates there interesting and informative. The House from the beginning made a good impression on guests in the National Capital. In 1789 a New York visitor wrote that in the House gallery he had heard more "Oratory, Learning, Law, and Good Sense" than he had ever heard in his life before.[30] Apparently the very contentiousness of the House debates attracted visitors, who enjoyed seeing gladiators in oratorical combat.

Contemporary descriptions of the scene in the upstairs Chamber varied, often reflecting the political prejudices of the observer. Abigail Adams claimed that several Members of the House and "some" Senators—Republicans, no doubt—were "wild as Bedlamites."[31] John Fenno, Federalist editor, did not like the eloquence of Senators Charles Pinckney or William Cocke. His Republican rival, Benjamin Franklin Bache, wrote derisively of the "blundering, hesitating, stammering eloquence of Hillhouse, the torpedo-eloquence of Livermore, the heels-over-head, sputtering eloquence of Read" and the "chilly, gallery-clearing eloquence of Chipman the philosopher, who finds much difficulty in reading his learned speeches."[32]

Maclay, who was on the scene, frequently referred to lack of order in Senate debates. One day they were merely "long and tedious." On another, "all was consternation and commotion." The 1789 tariff bill was debated with lack of order, sense, and decency. Senators "flamed," "blazed," "bounced," and "raged."[33]

However, Maclay, who believed he was the only man of integrity in the Senate, was too jaundiced an observer to do the Senate justice. He seemed inclined to believe that there was something sinister about every difference of opinion. Others wrote of "warmth" in Senate debates without concluding that anything was particularly amiss. Abigail Adams wrote in 1792 that even the southern, antiadministration Senators worked in harmony with their colleagues, with "no unbecoming heats or animosity."[34]

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[28] *Annals*, 3d Cong., 2d sess., Feb. 28, 1795, p. 1262; letter, Jefferson to Madison, Feb. 26, 1799, Lipscomb, *op. cit.*, X, 121; *Gazette of the United States*, Mar. 17, 1792.

[29] Watson, *op. cit.*, III, 219 ff.

[30] *Gazette of the United States*, Sept. 12, 1789.

[31] Letter, Abigail Adams to her sister, Oct. 4, 1789, Mitchell, *op. cit.*, p. 29.

[32] *Aurora*, Feb. 24, 1800.

[33] Maclay, *op. cit.*, pp. 71, 308, and *passim*.

[34] Letter, Abigail Adams to her sister, Apr. 20, 1792, Mitchell, *op. cit.*, p. 83.

In the emotion of farewell, unpleasant occurrences are often forgotten.[35] Even so, Vice President Adams' parting words to the Senate were emphatic enough to be significant:

> * * * I have never had the smallest misunderstanding with any member of the Senate. In all the abstruse questions, difficult conjunctures, dangerous emergencies, and animated debates, upon the great interests of our country, which have so often and so deeply impressed all our minds, and interested the strongest feelings of the heart, I have experienced a uniform politeness and respect from every quarter of the House.[36]

Four years later, Vice President Jefferson, saying farewell to a Senate controlled by his political opponents, spoke in much the same vein:

> I owe to truth and justice at the same time to declare, that the habits of order and decorum which so strongly characterize the proceedings of the Senate, have rendered the umpirage of their President an office of little difficulty; that in times and on questions which have severely tried the sensibilities of the house, calm and temperate discussion has rarely been disturbed by departures from order.[37]

One of these rare occasions on which the Senate departed from good order was July 4, 1798, when the Senators were intent on celebrating Independence Day by passing the Lloyd sedition bill. Describing the event to Jefferson, who was absent, Virginia's Senator Stevens T. Mason wrote:

> * * * there seemed to be a particular solicitude to pass it on that day. The drums Trumpets and other martial music which surrounded us, drown'd the voices of those who spoke on the Question. The military parade so attracted the attention of the majority that much the greater part of them stood with their bodies out of the windows and could not be kept to order. To get rid of such a scene of uproar and confusion an attempt was made at adjournment and then of a postponement of that question. These were both overruled and the final decision taken.[38]

In spite of such momentary improprieties, a genuine respect and cordiality existed among Senators even of opposing political faiths. This was demonstrated by the fact that the Federalist-controlled Senate twice elected as President *pro tempore* southerners who were out of sympathy with the politics of the majority. In 1792, Senator Richard Henry Lee of Virginia was elected to that office in spite of the fact that he had been a vigorous opponent of the Constitution in 1787–88 and had continued actively to fight the Federalist program. In 1795, when the Nation was rent by bitter partisanship centering around the Jay Treaty, the Federalist Senate elected as President *pro tempore* another Virginian, Henry Tazewell, a member of the Republican opposition.[39]

It should be remembered that never during the period under study did the Senate's membership exceed 32; the daily attendance was usually considerable less than that. During the first half of the period Senate sessions were not open to the public. These circumstances produced sessions the informality of which was only restrained by the personal dignity of the Members. On cold days all or part of the Senators would occasionally leave their seats and stand around the fireplace while business was being transacted.[40] The emphasis was not on prepared speeches but on informal arguments which would change votes. Especially in the days before the public was admitted, this conversation-type argument often did convince the speaker's colleagues. For example, on one occasion Senator Samuel Johnston—

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[35] Maclay wrote in 1789: "Up now got the Vice President, and for forty minutes did he harangue us from the chair. He began first on the subject of order, and found fault with everything almost, but down he came to particulars, and pointedly blamed a member for disorderly behavior." See Maclay, *op. cit.*, p. 27, entry for May 9, 1789.

[36] Adams address to Senate, Feb. 15, 1797, Adams *Works*, VIII, 526.

[37] Jefferson address to Senate, *Senate Journal*, 6th Cong., 2d sess., Feb. 28, 1801, p. 100.

[38] Letter, Mason to Jefferson, July 6, 1798, Jefferson papers, Library of Congress microfilm, vol. 104, 17825, cited by James Morton Smith, *Freedom's Fetters* (Ithaca, N.Y.: Cornell University Press, 1956), p. 111.

[39] *Senate Journal*, 2d Cong., 1st sess., Apr. 18, 1792, p. 186; 4th Cong., 1st sess., Dec. 7, 1795, p. 4.

> had said something for the bill as it stood, but when Elsworth made his motion, he got up to tell how convincing the gentleman's arguments were and that they had fully convinced him.[41]

While contemporaries often recorded visits to the Gallery of the House of Representatives to listen to the lively debates in the Chamber below, very few mentioned availing themselves of the Senate's Gallery after it was constructed and opened in 1795. Two dozen gentlemen discussing a bill in conversational tones were no match for the gallery-minded oratory of the lower Chamber.

The records of the period produce the impression that the Senate's first emphasis on courtly forms and ritual and early pretensions to superiority over the House gradually gave way to a tradition of urbane dignity.

A charming picture of the Senate in session about 1796 was drawn by William McKoy in the series of articles in *Poulson's American Daily Advertiser* in 1828-29 which has previously been mentioned. McKoy no doubt surrounded the days of his youth with the aura which so often attaches itself to a romantic past. Yet his description, too, must be given the credence due the account of an eyewitness.

> Among the thirty Senators of that day there was observed constantly during the debate the most delightful silence, the most beautiful order, gravity, and personal dignity of manner. They all appeared every morning full-powdered and dressed, as age or fancy might suggest, in the richest material. The very atmosphere of the place seemed to inspire wisdom, mildness, and condescension. Should any of them so far forget for a moment as to be the cause of a protracted whisper while another was addressing the Vice-President, three gentle taps with his silver pencilcase upon the table by Mr. Adams immediately restored everything to repose and the most respectful attention, presenting in their courtesy a most striking contrast to the independent loquacity of the Representatives below stairs, some few of whom persisted in wearing, while in their seats and during the debate, their ample *cocked* hats, placed "fore and aft" upon their heads * * *.[42]

ABSENCE WITHOUT LEAVE

By far the most prevalent sin against the Rules of the Senate was that of absenteeism—Members delaying their arrival in the Capital until days, sometimes weeks, after the scheduled opening day, and leaving the Capital without leave during the course of the session. On several occasions during this period absenteeism was so rife as to interfere seriously with the work of the Senate.

In only one-half of the 14 sessions from 1789 to 1801 did the Senate achieve a quorum the opening day. In the first session in 1789 the

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[40] Maclay, *op. cit.*, p. 21.

[41] *Ibid.*, p. 195.

[42] Quoted in Watson, *op. cit.*, III, 219-220. Joseph West Moore's *American Congress*, p. 143, erroneously attributed this description to a "Philadelphia newspaper in 1791." Since the article elsewhere mentioned Dayton as Speaker, it could not have appeared before the 4th Cong.

Senate was more than a month late in getting down to business. Thereafter delays in achieving the necessary quorum ranged from 1 day to 15 (in 1794). This does not tell the whole story of late arrivals, however, because in many cases the Senate was quite shorthanded for long periods after the necessary 50 percent of the membership had arrived. Nor did Vice Presidents Adams and Jefferson always set a good example of promptness. The latter, for example, arrived more than 3 weeks late in 1798.[43]

At the opening of the 1789 session, only eight Senators reported the first day. After a week had gone by without the arrival of a single additional Member, these eight decided to send a courteous letter to their dilatory brethren:

> * * * We apprehend that no arguments are necessary to evince you the indispensable necessity of putting the Government into immediate operation; and therefore earnestly request, that you will be so obliging as to attend as soon as possible.[44]

The letter, urgent though its message was, seemed to have no effect, since another full week went by without the arrival of a single additional Senator. The eight then decided to send a second letter, this time addressed only to the Senators from the nearest States—New Jersey, Delaware, Maryland, and Virginia—from which no Senator had yet arrived.[45] After the dispatch of this second letter, 17 days went by before the Senate's first quorum was finally formed.

The opening of the second session of the Third Congress was another occasion upon which the Senate found it particularly difficult to get together a quorum so that business could be set in motion. November 3, 1794, the scheduled opening day, found only 10 Senators present—5 short of a quorum. A sufficient number of House Members appeared to allow the lower Chamber to begin business the following day.

After the House had sat idle for nearly a week vainly awaiting a Senate quorum, Representative John Beatty of New Jersey, expressing the growing impatience of the House Members, asked why the House should wait longer for the Senate. He denied that the Constitution forbade one House from proceeding until the other was ready. Representative Benjamin Goodhue replied that there was no precedent on the continent for one Chamber to proceed without the other. The House by this time was impatient enough to agree with Beatty and adopted a motion by his colleague, Jonathan Dayton, to get down to business—which the House forthwith proceeded to do. The decision gave the lower Chamber an 8-day start on the Senate, which did not form a quorum until November 18.[46]

The more prompt Members were so exasperated by the dilatory Senators that they appointed a committee to report a new standing rule to compel attendance. They apparently soon recovered from their vexation, however, since the *Senate Journal* does not indicate that the committee ever reported out any rule to help prevent such delays in the future.[47]

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[43] *Aurora*, Dec. 27, 1798.
[44] *Senate Journal*, 1st Cong., 1st sess., Mar. 11, 1789, p. 4.
[45] *Ibid.*, Mar. 18, 1789, p. 5.
[46] *Annals*, 3d Cong., 2d sess., Nov. 5, 1794, pp. 869–870; Nov. 10, 1794, pp. 871–872.
[47] *Senate Journal*, 3d Cong., 2d sess., Nov. 3, 1794, to Nov. 21, 1794, pp. 3–16.

Yet absenteeism throughout the session continued to prove the need for such a rule. The average attendance at rollcall votes was less than 22 out of a total membership of 30. The largest attendance on any vote was 24. Most of the absences were apparently without leave.[48]

The second session of the Fifth Congress (1797–98) saw another period of notorious absenteeism. Scheduled to report on November 13, 1797, the Senators did not form a quorum until November 22. Members straggled into the Capital for a month after the opening day. The *Aurora* of November 18 noted that the House—which apparently had not accepted the 1794 decision as a precedent—had met again the previous day but had been unable to proceed to business due to lack of a Senate quorum. The editor wondered how the absent Members could reconcile their conduct in thus putting the Nation to a useless expense of two to three thousand dollars. He then added a bit of innuendo:

> Such members, indeed, as may be amusing themselves with *innocent diversions*, such as *Horseracing* for instance, will stand excused by their Constituents, at least by all *Lovers of the Turf!*

Two months later a motion to amend the Senate rules to provide machinery for enforcing attendance was referred to a five-man committee, the large size of the committee indicating the importance attached to the subject.[49]

While the committee delayed its report, absenteeism continued, in spite of the feverish state of the Nation's foreign relations. This dereliction of duty affected both Federalists and Republicans, House as well as Senate, and excited much unfavorable comment. Absenteeism by Federalists, especially, vexed the party faithful both outside and inside Congress, since it was feared that truancy endangered the party's program in dealing with the French crisis. One Federalist writer, searching for words strong enough to condemn the truants, declared that they were criminals who betrayed their country and were more deserving of public indignation than "even Gallatin or Giles." [50]

Actually, the party's majority in the Senate at this time was too topheavy to be endangered by the current wave of unexcused absences, but the overall effect of such neglect of duty could hardly fail to injure, in the eyes of the public, the party that so loudly proclaimed its devotion to the dignity of government.

The Senate by this time had come to the realization that steps must be taken to enforce attendance. On June 25, 1798, the Chamber, acting on the report of the committee named more than 5 months previously, finally added enforcement machinery to its standing rule prohibiting absences without prior permission:

> And in case a less number than a quorum of the Senate shall convene, they are hereby authorized to send the Sergeant at Arms, or any other person or persons by them authorized, for any or all absent members, as the majority of such members present shall agree, at the expense of such absent members respectively, unless such excuse for non-attendance shall be made, as the Senate when a quorum is convened, shall judge sufficient * * * . And this rule shall apply as

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[48] *Ibid., passim.*

[49] *Senate Journal*, 5th Cong., 2d sess., Jan. 9, 1798, p. 53.

[50] *Gazette of the United States*, May 8, 1798. See also letter, Abigail Adams to her sister, Apr. 22, 1798, Mitchell, *op. cit.*, p. 161.

> well to the first convening of the Senate, at the legal time of meeting, as to each day of the session, after the hour has arrived, to which the Senate stood adjourned.[51]

The reason generally given for the Senators' tardy arrival in the Capital was the lamentable transportation facilities of the time. Stormy seas and quagmire roads were indeed formidable deterrents in that day, particularly in the winter months. "The season of the year, the peculiar badness of the weather, and the short interval between the epoch of election and that of meeting" appeared to James Madison sufficient explanation for the 1789 delay. Ralph Izard, one of the South Carolina Senators, wrote from Charleston on April 3, 1789, that "bad weather and equinoctial winds have detained me here, but I expect to embark tomorrow for New York." Wingate of New Hampshire, one of the first to arrive that year, generously blamed the tardiness of his colleagues on "sickness or unfavorable circumstances." The *Pennsylvania Gazette* of March 18, 1789, was quick to discern that the punctuality of the New England Members compared to that of Members from the South argued forcefully for a more southern location for the Capital (e.g., Philadelphia).[52]

Unfortunately, such reasons, although valid enough in some cases, do not tell the whole story. Some Senators apparently made little effort to arrive on time. Among those who reported on March 4, 1789, were none from the nearby States of New Jersey, Delaware, or Maryland—Senators who, if present, would have brought the Senate a quorum the first day. On the other hand, William Few of faraway Georgia, one of the last Senators to be elected, managed to appear on time.

The correspondence of Senator Paterson of New Jersey intimated that his delay was due to unwillingness to waste time by crossing over to New York long before his presence would bring a quorum—that he informed himself concerning the quorum situation and arrived well before he was needed. On the other hand, one of the House Members from Pennsylvania claimed that southern Members deliberately delayed their journey in order to utilize for their own purposes the time before the arrival of the President and Vice President in the Capital, "a Circumstance which has hitherto defeated everything." An anonymous Member of either Senate or House recorded some further rumors of private reasons for delay:

> Congress have not yet formed, there being only 21 Representatives and 8 Senators present, and by the accounts, we hear of one being engaged in his mill, another in his Spring work, a third in fixing out his fishing vessels, a fourth pleading in the Courts, and a fifth doubting whether 'twill be in his interest to give up some State office; it is quite uncertain, when we shall make a quorum.[53]

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[51] *Senate Journal*, 5th Cong., 2d sess., June 25, 1798, pp. 386–387.

[52] Letter, Madison to Jefferson, Mar. 29, 1789, Hunt, *op. cit.*, V, 335; letter, Izard to Jefferson, Apr. 3, 1789, "Letters of Ralph Izard," *South Carolina Historical and Genealogical Magazine*, II (January 1901), p. 203; letter, Wingate to Timothy Pickering, Mar. 25, 1789, Wingate, *op. cit.*, II, 289. It will be noted that Izard's letter was written a month after the day set for the meeting of Congress. The published correspondence does not show what the Senator's activities were at the time he would normally have departed if he expected to arrived in New York by Mar. 4.

[53] Wood, *op. cit.*, pp. 92–93, citing *Somerset County Historical Quarterly*, II, 183; letter Henry Wynkoop to Dr. Reading Beattie, Mar. 23, 1789, *Pennsylvania Magazine of History and Biography*, XXXVIII, *op. cit.*, 48; extract from letter of an unnamed New York correspondent, Mar. 15, 1789, in *Connecticut Courant*, Mar. 30, 1789. Use of the pronoun "we" in the quotation above apparently indicates that the writer was a Member of Congress.

In subsequent years, a more valid reason for late arrival was the fact that since most of the congressional business originated in the House, the Senate often had very little to do during the early days of a session. Moreover, some members of the Republican minority may have felt that since they were almost invariably outvoted by the Federalists, their presence or absence would make very little practical difference, especially since committee assignments usually went to members of the majority.[54]

Although some of the absences were caused by illness or other unavoidable circumstance, it is difficult to escape the conclusion that much of the absenteeism was due to failure to take senatorial duties as seriously as they merited. The exasperation of the more diligent Senators over widespread absenteeism indicates their belief that it was inexcusable. Some of their colleagues, on the other hand, apparently believed that in forming an urbane and dignified Senate, it was not the purpose of the framers of the Constitution to establish a body whose Members would be expected to keep their noses to a daily grindstone. Senator George Read of Delaware was apparently one of those who believed that sustained exertion was not expected of Senators. Replying to an offer by Governor Joshua Clayton of any one of three high judicial posts in Delaware, he wrote the Governor on August 20, 1793, as follows:

> [These offers are] a strong inducement with me to give up a resolution I had taken to avoid as much as I reasonably might all public duties that would require great attention and much exercise of the mental faculties. The station in which the Legislature of the State has been pleased to place me for the four years past, and continuing for near four years to come, of their representative in the Senate of the United States, was and is more eligible in my view, as well on account of a less continued exertion of the mind, as in point of importance to society.[55]

Different in its nature from the absenteeism so far described was the action of several Senators in May 1794, in deliberately absenting themselves from the Chamber in order to avoid a vote. The Virginia Senators, under instruction from their State's assembly, asked permission to introduce a bill to suspend the fourth article of the treaty of peace with Great Britain (prohibiting impediments to collection of debts owed by American citizens to British subjects) until Britain complied with her obligations under the treaty, including evacuation of posts on American soil and making restitution for slaves carried away by British forces. Senators from southern and border States apparently felt that the issue placed them in an awkward position, because five of them retired to the lobby when the question was put. A sixth was excused at his own request. Vice President Adams called this deliberate avoidance of a vote the "greatest curiosity of all." He claimed this was the first time this had happened in the Senate. In a House debate the same year it was claimed that avoidance of voting was a frequent occurrence.[56]

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[54] This was the reason given by a Virginia writer for the frequent absences of Senators Stevens T. Mason and Wilson C. Nicholas before the Republicans achieved a majority in the Senate in the 7th Cong. See Grigsby, *op. cit.*, II, 333. Mason did not show up during the entire 2d sess. of the 3d Cong.

[55] Letter, Read to Clayton, Aug. 20, 1793, Read, *op. cit.*, p. 547. The Senator was, however, finally induced to accept the post of chief justice of the Delaware Supreme Court. In spite of his attitude toward the application to business expected of Senators, his own attention to duty as a Senator was quite good.

[56] Rufus King memorandum of Senate debate dated May 6, 1794, King, *op. cit.*, I, 526–527; letter, Adams to his wife, May 10, 1794, Adams *Works*, I, 473; *Annals*, 3d Cong., 1st sess., Feb. 3, 1794, pp. 418–420.

THE SENATE TIMETABLE

Except at the close of a session, when earlier meetings were common, the Senate met each day at 11 a.m. and adjourned early or late as the business of the day might demand. Congressional critics claimed that 3 p.m. adjournments were common. However, sometimes the Senate met on Saturday and even on holidays like New Year's Day and Independence Day.[57]

As discussed in chapter VI above, the House of Representatives originated by far the larger part of the legislation considered by Congress during this period, the Senate serving chiefly as a chamber of revision. One of the results of this circumstance was that during the early weeks of each session the Senators had little business to transact while they waited for bills to be referred to them after study, debate, and passage by the lower House. They paid the price for this early-session inertia during the closing days of the session, when they faced what was then considered an avalanche of legislation.

Maclay's *Journal* contains numerous references to the Senate sitting idle or adjourning early during the first few weeks of a session. Such idleness vexed Vice President Adams, who, on February 8, 1794, more than 2 months after the session opened, wrote to his wife:

> I, for my part, am wearied to death with *ennui*. Obliged to be punctual in my habits, confined to my seat, as in a prison, to see nothing done, hear nothing said, and to say and do nothing.[58]

A month later his tone was different. Business was now carried on "with rapidity" and he faced a period of severe duty.[59]

Vice President Jefferson confronted the same kind of situation. Arriving in the Capital on Christmas Day, 1799—3 weeks after the session had opened—he stated, in somewhat of an exaggeration, that not a single bill or other piece of business had yet been brought before the upper Chamber.[60]

At the opening of the Second Congress in October 1791 prominent Senators realized that definite steps ought to be taken to prevent an early-session lag and excessive dependence on the House to initiate the legislative program. Consequently, a week after the opening of the session and just after the Senators returned to their Chamber after listening to the President's annual message, a committee composed of Senators Strong, Butler, and Burr was appointed to "consider and report what business it is necessary for the Senate to proceed on." A week later this committee recommended that the Senate begin action on several measures mentioned by the President, as well as certain other legislation which its Members considered of high priority—six important measures in all. The Senate agreed to this report and immediately appointed committees to begin work on them.[61]

In the meantime, Senate leaders requested their friend, Representative Theodore Sedgwick of Massachusetts, to suggest to the House that the lower Chamber avoid duplicating the Senate effort and turn to other important subjects referred to by President Washington. Sedgwick complied; in a House speech, he pointed out to his colleagues that in the previous session they had appointed committees to consider almost every subject of discussion in the President's message and had so monopolized the public business as to leave the Senate very little to do during a large part of the session. He then listed the portion of the message to which the Senate proposed to apply itself and suggested that the House turn to several other important subjects requiring action.

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[57] Jefferson showed the Senate's daily routine in detail in his *Manual*, sec. XIV.
[58] Adams *Works*, I, 465.
[59] Adams to his wife, Mar. 12, 1794, *Ibid.*, I, 468.
[60] Letter, Jefferson to Madison, Jan. 3, 1799, Lipscomb, *op. cit.*, X, 67.
[61] *Senate Journal*, 2d Cong., 1st sess., Oct. 31, 1791, p. 17; Nov. 1, 1791, p. 22.

Representative Elias Boudinot, replying to Sedgwick's suggestions, objected to the method, although not to the principle, of the Senate plan. He claimed that it was improper for the House to receive any information from the Senate except through official channels, but suggested that the problem might be solved by appointment of a joint committee to divide up the business suggested by the President's address. The House, however, declined to consider the suggestion seriously and proceeded to act independently. The net result, nevertheless, was that during this session the workload was more evenly distributed.[62]

A month after the opening of the second session of the Fourth Congress, the Senate made a more direct effort to join the House in preparing a calendar of business to be considered during the session. Senators Burr, Ellsworth (later replaced, at his own request, by Jackson of Georgia), and Strong were appointed a committee to confer with a parallel House committee concerning "what business is necessary to be done during the present session."[63] The Senate's request for appointment by the House of a committee to meet with the three Senators met with ridicule in the lower Chamber. Jonathan Dayton of New Jersey claimed that no House committee could then comply with such a "requisition," since House Members were daily bringing up new business which they considered important; perhaps in 6 weeks the Senate motion might have a "shadow of propriety." William Smith of South Carolina remarked that such a committee would have to be composed of "three prophets." Furthermore, since the Senators had only recently formed a quorum, it was unseemly for them already to inquire about adjournment. Samuel Dexter of Massachusetts declared that he understood the Senate's resolution had been adopted by a majority of only one and that it would be a waste of time for the House to trouble itself further about a resolution carried by such a small majority. Sedgwick, who was almost alone in defending the Senate's proposal, denied that preparing a schedule of business had anything to do with adjournment and insisted that the House ought to appoint a committee to meet with the Senators, if only as a matter of civility. The result of the debate was that only a handful of House Members voted to accept the Senate proposal.

It will be noted that this discussion did not follow party lines. Federalists, who might normally have been expected to support the Senate, were among the most vociferous opponents of the Senate's suggestion. It appears that opposition to a joint calendar of business was largely a display of independence by House Members who objected to alleged Senate interference in the business of the House.[64]

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[62] *Annals*, 2d Cong., 1st sess., Nov. 1, 1791, pp. 24–25 (Senate); Nov. 1, 1791, p. 150 ff. (House of Representatives).

[63] *Senate Journal*, 3d Cong., 2d sess., Dec. 8, 1794, p. 23.

As mentioned in chapter VI, on one later occasion during this period the Senate stirred itself to initiate a large proportion of the legislative output of a session. This was during the second session of the Fifth Congress, when the Senate originated such significant measures as the Alien and Sedition Acts and numerous bills to augment the military strength of the United States. Otherwise, however, the Senate left to the House the task of originating the great bulk of legislation, leaving the Senate often marking time in the early weeks of the sessions.

Scheduling of dates on which to take up consideration of measures was done in a haphazard, "hand to mouth" fashion. Jefferson's *Manual* stated that the Speaker (presiding officer) was not precisely bound by any rules as to what measures should be taken up first; he could use his own discretion unless the Senate itself decided what particular subject should be taken up. However, Jefferson himself accepted the necessity of some kind of order of preference and stated that when the Senate's preliminary business had been disposed of measures ready for action should be taken up according to seniority—that is, in the order in which they were first introduced in the Senate.[65] However, the Senate often declined to follow this order and either temporarily postponed consideration or designated certain future days for action, according to the exigencies of the moment.

The only concession to the idea of a joint calendar of business that Congress was willing to accept was the custom, in the even-numbered years, of naming a joint committee well along in the session to determine what business must be finished before adjournment and what measures could conveniently be postponed until the next session. (In the odd-numbered years Congress automatically adjourned on March 3.) Sometimes the resolution naming the members of the committee designated the adjournment date to be strived for; at other times the joint committee was directed to report a proposed adjournment date.[66]

This lack of business in the early part of each session was intensified somewhat by the so-called *de novo* rule. This rule provided that a bill which passed one Chamber during a session but was still pending in the other when Congress adjourned *sine die* was dead and could not be held over for action at the following session, even though that session was part of the same Congress. In other words, all bills had to be introduced anew at the beginning of each session. The Senate, therefore, never began a new session with a backlog of House bills awaiting action.

Adoption of this rule followed the report of a joint Senate-House committee and was adopted in January 1790 after considerable discussion in .both Houses. The precedents of Parliament and of the State legislatures were used by both sides in the debates. The claim that bills ought to be carried over from session to session within the same Congress was based on the obvious argument that such a rule would save a great deal of time and expense. Moreover, that method would discourage precipitate action; in fact, said Maclay, who led this side of the argument in the Senate, some State constitutions provided that no bill, except in case of necessity, could be enacted into law during the same session in which it was introduced.

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[64] For the House debate on this question, see *Annals*, 3d Cong., 2d sess., Dec. 8, 1794, p. 969 ff.

[65] Jefferson's *Manual*, sec. xiv.

[66] *Senate Journal, passim.* In 1800, apparently no such committee was appointed. The House merely submitted to the Senate a proposed adjournment date, which was subsequently changed a number of times.

Those who claimed that action on all bills must begin anew with each session argued that the recess of Congress would give Members opportunity to consult their constituents regarding the legislation, that events occurring during the recess might convince Members of the impropriety of a measure passed by one House at the previous session, and that carrying bills over from the previous session was unfair to North Carolina, which had not then been represented. One House Member, William Smith of South Carolina—with the suspiciousness so characteristic of the period—feared that if business were not begun anew, Members from States near the Capital might assemble in a thin House at the beginning of a session and pass measures inimical to the public welfare before the remainder of the Members arrived.

Which of these arguments carried the most weight is difficult to determine; in any event, the rule to begin all business anew was adopted by a 10-to-8 vote in the Senate and by a 30-to-21 vote in the House.[67]

The delaying effect of this rule on the progress of congressional business was not, however, as great as might be expected. It applied only to the technical status of bills—Members still enjoyed the advantage of the information brought to light in the debates and committee hearings of the previous session. The unfinished business of a previous session could be, and was, given precedence in a new session. Finally, it was the custom at that time to act upon almost all bills before adjournment, leaving relatively few bills hanging fire at the end of a session.[68]

It will be recalled that during its first session the Senate invited much criticism by spending weeks debating so secondary a matter as a title for the President. Thereafter both Houses sometimes spent long hours debating and writing into legislation comparatively minor details which could better have been left to the discretion of the executive officers concerned.

It is not the intention here to discuss the admittedly important, centuries-old question of how closely a legislative body ought to control the Executive through minute and specific legislation, or whether Republicans or Federalists were right in the controversy over specific appropriations.[69] It is sufficient for the purpose here merely to point out that both Houses sometimes became involved in disputes over minor questions which unduly protracted the sessions. Maclay considered a clash between Senate and House over the pay of their doorkeepers "pretty amusement for the governors of a great empire.[70] Alteration of the pay of the accountant of the War Department required a special bill demanding debate and amendment in both Houses. Legislation was required not only to set the pay of Army officers and men but also to determine the exact amount of their uniform allowance from hat to socks and buckles and the amount of their daily ration—1 pound of beef, half a gill of rum, whisky, or brandy. Post office legislation traced in detail the exact routes of all post roads from Wiscasset, Maine, to Savannah, Ga.—although some Senators, when this legislation first came up, favored giving the President and Postmaster General full authority to designate the roads. The act setting up machinery for collection of duties required 75 sections and filled 46 columns in the appendix to the *Annals*.[71]

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[67] *Annals,* 1st Cong., 2d sess., Jan. 11, 1790, pp. 1085–1087, Jan. 25, 1790, pp. 1116–1117 (House of Representatives), Jan. 25, 1790, pp. 975–976 (Senate); notes from Adams' diary, Adams *Works,* III, 414; Maclay, *op. cit.,* pp. 179–186.

[68] For examples, see *Annals,* 3d Cong., 2d sess., Nov. 13, 1794, p. 878; *Senate Journal,* 2d Cong., 2d sess., Jan. 6, 1792, p. 18; *ibid.,* 4th Cong., 1st sess., Dec. 17–18, 1795, pp. 29–31. The "de novo" rule was not officially reversed until 1868; see Lauros G. McConachie, *Congressional Committees* (New York: Thomas Y. Crowell & Co., 1898), p. 323.

[69] This subject is discussed in Leonard D. White, *op. cit.,* ch. XXVI, pp. 323–334. See also Lucius Wilmerding, Jr., *The Spending Power* (New Haven: Yale University Press, 1943), chs. I and II. In the 2d sess. of the 2d Cong., a clash occurred between the Senate and the House when the former eliminated specific itemization in the War Department appropriation bill and the latter insisted on its rejection of a lump-sum appropriation. See *Annals,* Feb. 22, 1793, pp. 889–890.

Further protracting and complicating the work of Congress was the necessity of passing on large numbers of claims against the Government, especially claims based on war service. The lower Chamber carried the heavy end of this load. Its Committee on Claims, one of the first standing committees of the House, considered hundreds of petitions for pensions and other forms of relief, eliminated those which appeared unjustified, and included the others in private relief bills—sometimes in omnibus measures containing scores of names. This work was so strenuous that Members sought to be excused from reappointment to the committee.[72] Since the House did so much preliminary screening, comparatively few private bills were introduced in the Senate, although the Senators carefully scrutinized the bills sent up from the House. Maclay described several occasions when considerable time was spent arguing the merits of claims amounting to no more than a few hundred dollars. On one such claim, a Senate committee even sat as a court of inquiry listening to witnesses in the claimant's favor.[73]

In an effort to reduce and regulate pension legislation, Congress in 1793 passed a law requiring claimants to submit substantiating evidence to the Federal courts, which were to forward it to the Secretary of War, who, in turn, was to submit to Congress recommendations regarding the claims' validity. Congress still faced the task, however, of studying and acting on each of these recommendations, and the private relief bills continued.[74]

Both Houses of Congress were often accused of frittering away their time talking instead of acting—not an uncommon criticism of democratic assemblies. In 1797, a writer styling himself "Chronometretes" carefully computed how much each minute of speechifying cost the taxpayers—$5.60 in the House and $1.65 in the Senate, costs which he considered indefensible! He claimed that the Senators were less guilty than the House, however, because although additional time was one of the prerogatives of an upper Chamber, House Members had shown a disposition to speak four times as long as Senators.[75] Another writer put his criticism in verse form:

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[70] Maclay, *op. cit.*, p. 222.

[71] *Senate Journal*, 4th Cong., 1st sess., May 17, 1796, p. 260; appendix to the following volumes of the *Annals:* 1st Cong., 2d sess., pp. 2281–2284, act of Apr. 30, 1790, pp. 2311–2357, act of Aug. 4, 1790; 2d Cong., 1st sess., pp. 1333–3341, act of Feb. 20, 1792; Maclay, *op. cit.*, p. 308.

[72] *Annals*, 4th Cong., 1st sess., Dec. 10, 1795, pp. 130–131.

[73] Maclay, *op. cit.*, pp. 258, 298, and *passim*. As early as 1790, Hamilton recommended that Congress grant the Executive discretion in such cases; see letter, Hamilton to the House, Jan. 19, 1790. Lodge, *Works of Hamilton*, III, 46–47.

[74] Appendix to *Annals*, 2d Cong., 2d sess., act of Feb. 28, 1793, pp. 1436–1437.

CONGRESS

Three months the fathers of the nation,
Have tugg'd the oars of Legislation;
And in long speeches more have *said*,
Than penal patience ever read—
Meantime, *the Business they have done,*
Amounts to three short acts, save one.[76]

Critics accused Congress not only of indecisiveness and wasting time, but of simple sloth. They pointed especially to the fact that the House and Senate often sat only 4 hours a day, implying that that was all the time they spent on public business. Washington on occasion defended Congress against such charges. Possibly its work could be done faster, he wrote David Stuart, but in a country with such diversified interests conflicts were inevitable. Furthermore, when the Houses were not in actual session, Members were usually meeting in committees.[77] However, sometimes even the Members themselves and such highly placed officials as Oliver Wolcott, Jr., expressed exasperation over the slow movement of the legislative machinery.[78]

Absence of a predetermined timetable was most obvious at the close of each session, when both Houses were deluged by the flood of business on which action had been delayed during the session. This situation, with its concomitant early-morning and late-evening sessions, has, of course, been a frequent occurrence ever since. In fact, Members of both Houses of more modern times would probably find something strangely familiar in the 1790 closing-day scene described by Maclay:

> As well might I write the rambles of Harlequin Ranger or the vagaries of a pantomine as to attempt to minute the business of this morning. What with the exits and the entrances of our Otis, the announcings, the advancings, speechings, drawings, and withdrawings of Buckley and Lear, and the comings and goings of our committee of enrollment, etc., and the consequent running of doorkeepers, opening and slamming of doors, the House [Senate] seemed in a continual hurricane. Speaking would have been idle, for nobody would or could hear. Had all the business been previously digested, matter or form would have been of little consequence. This, however, was not the case. It was patching, piecing, altering, and amending, and even originating new business.[79]

In this early period the total number of bills requiring consideration was so small that there was less excuse than now for such a legislative logjam at the close of a session. On the other hand, during this period neither individual Senators nor Senate committees had staffs to assist them—practically all the legislative work was done by the Members themselves.

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[75] *Aurora*, Dec. 13, 1797.

[76] *Gazette of the United States*, Apr. 18, 1797.

[77] Letter, Washington to Stuart, June 15, 1790, Fitzpatrick, *Writings of Washington*, XXXI, 50–51. See also letter, Washington to Lafayette, Aug. 1, 1790, *ibid.*, XXXI, 86.

[78] Letter, Oliver Wolcott to Frederick Wolcott, Apr. 6, 1792, Gibbs, *op. cit.*, I, 75; letter, Oliver Wolcott to his father, May 3, 1794, *ibid.*, I, 136; letter, Oliver Wolcott to his father, May 26, 1796, *ibid.*, II, 341; Wingate, *op. cit.*, II, *passim*.

[79] Maclay, *op. cit.*, p. 411. Otis was Secretary of the Senate, Beckley (whom Maclay called "Buckley") was Clerk of the House. Lear was secretary to President Washington.

The third session of the First Congress placed President Washington in the position of having to sign three-fourths of the legislation of the entire session (21 measures out of 29) in a 1-week period at the close of the session. Such bursts of activity involved frequent use of the "unanimous-consent" device to push bills through the three required readings in a single day, appointment of committees which made their reports within a few hours, and last-minute conference-committee action on bills passing the two Houses in different forms.

On the very last day of his second term, Washington, in what was for him unusually bitter language, complained of the burden placed on a President by the action of Congress in leaving so much activity to the last few days of a session.

> When I add, that according to custom, all the Acts of the Session, except two or three very unimportant Bills, have been presented to me within the last four days, *you* will not be surprised at the pressure under which I write at present, but it must astonish *others* who know that the Constitution allows the President ten days to deliberate on *each Bill* that is brought before him that he should be allowed by the Legislature less than half that time to consider *all* the business of the Session; and in some instances scarcely an hour to revolve the most important. But as the scene is closing with me, it is of little avail now to let it be with murmurs.[80]

On the other hand, by submitting nominations of large numbers of executive and judicial officers for Senate confirmation during the closing days of a session, President Washington placed a somewhat similar burden on the Senate. During the last 6 days of the first session of the First Congress, for instance, he submitted nominations of 6 Supreme Court justices, 13 district judges, 13 district attorneys, 13 marshals, 2 Cabinet members, a Postmaster General, a diplomat, and 46 Army officers. Despite the rush of other business, the Senate confirmed most of these the same day their names were received. Not even the censorious Maclay objected.[81]

The practice of leaving an inordinate share of the session's business to the last day continued throughout the period under study. On the last day of the second session of the Sixth Congress, the Senate passed one-third of the 35 bills adopted at the session. Several other bills were defeated by lack of the unanimous consent necessary to dispense with the rule against more than one reading in a single day.[82]

A good example of the awkward position in which the close-of-session rush placed both Houses in the odd-numbered years (when the Members had no choice but to adjourn on March 3) is provided by the train of events involving the military and naval appropriation bill of 1797. The House submitted this bill to the Senate on the very last day of the session. In addition to its intrinsic importance, the bill involved a further crucial question of policy because it contained a provision confining expenditures to the specific objects for which each sum was appropriated—a departure from the custom of blanket military appropriations which allowed funds to be transferred from one purpose to another within the Military Establishment. The Senate's Federalist majority struck out this provision. Amid the furor always accompanying the last hours of a session, the House, led by

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[80] Letter, Washington to Jonathan Trumbull, Mar. 3, 1797, Fitzpatrick, *Writings of Washington*, XXXV, 411–412.

[81] *Senate Executive Journal*, Sept. 24 to 29, 1789, pp. 29–35. Maclay, *op. cit.*, pp. 162-169.

[82] *Senate Journal*, 6th Cong., 2d sess., Mar. 3, 1801, pp. 114–132.

Gallatin, by a 52-to-36 vote refused to concur in the Senate action. Thus the Senate was placed in the difficult situation not only of having to act on a critical measure with virtually no study, but also of having to accept the lower Chamber's innovation or see the whole vital bill fail of passage by expiration of the Congress at the midnight hour—an emergency which would have made it necessary for the newly elected President to call a special session.

The Senate's Federalists chose the former as the lesser of two evils, but expressed its resentment by introducing a resolution designed to prevent such outrages in the future. This resolution, after outlining the injustice done the Senate and the legislative process by the House action, provided:

> That three readings of such a crucial bill in 1 day should not be used as a precedent;
>
> That the Senate would not thereafter originate any important bills after 10 days before the legally required close of the session in odd-numbered years;
>
> That it would not accept such measures from the House in that 10-day period, and
>
> That it would not accept any bill, in any session of Congress, unless 3 days (exclusive of Sundays) remained for due and deliberate reading and discussion.

The Federalist majority did not hold together for the immediate passage of this resolution and it was postponed to the next session by a vote of 18 to 8. There was, of course, no time for adequate consideration of such radical rule changes on the very last day of the session; probably the resolution's chief value was as a protest.[83]

The Senate's resentment against the House was not justified, however; there was here no deliberate effort by the lower Chamber to "cram the bill down the throats of the Senators" as the Federalists claimed. As far back as January 5, 1797, the House had appointed a committee to study the needs of the Military Establishment. The resultant authorization bill was vetoed by the President and a new bill had to be introduced, debated, and passed. All this delayed House consideration of the military appropriation bill to February 27, so that the lower House had only 4 days to consider so important a bill. On the other hand, House Members at this very time had a grievance against the Senate for sending them, on the last day of the session, a Senate bill authorizing the sale of certain Western lands.[84]

Senate rule XIII, requiring that bills be read once on each of three different days before passage unless the Senate by unanimous consent directed otherwise, made it possible for a single Member to block legislation on the last 3 days of the session. For example, in 1796 five Republican Senators availed themselves of this rule to retrieve a defeat for their party in the House; by refusing such unanimous consent they defeated a House bill authorizing the President to lay and revoke embargoes during the recess of Congress.[85] Efforts were made from time to time to eliminate rule XIII so as to deprive the minority of such power. The Senate during this period was never willing to drop the rule entirely, but on at least one occasion (1798) suspended it during the last 3 days of the session.[86] (183)

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[83] In 1822 Congress adopted a rule providing that no bill be sent from one House to the other during the last 3 days of a session. Congestion continued, however, because Congress, under pressure at the close of a session, adopted the practice of suspending the rule by concurrent resolution. See Ada C. McCown, *The Congressional Conference Committee* ("Columbia University Studies in History, Economics and Public Law," vol. CCXC [New York: Columbia University Press, 1927]), p. 58.

[84] *Annals*, 4th Cong., 2d sess., Mar. 3, 1797, pp. 1572–1577 (Senate); Mar. 3, 1797, pp. 2353, 2358–2361 (House of Representatives).

[85] *Senate Journal*, 4th Cong., 1st sess., June 1, 1796, pp. 342–343.

Judging by modern standards, the number of bills involved in these end-of-session "logjams" was very small indeed. However, they constituted a large share of the legislative output of each session and involved important questions of public policy during a time when the Government under the Constitution was definitely on trial.

In spite of extenuating circumstances, the incidents described illustrate the awkward situation resulting from the absence of a schedule of legislative business and from the practice of leaving to the last few days of a session decisions on many critical issues. Perhaps the *Aurora,* which was not exactly famous for calm study of a situation, was right in suggesting that the lawmakers' dignity would have been better promoted if Congress had been able "to mind its business on time.[87] Such timely execution of its duties, however, was hardly possible without a wider recognition of the need for a steering group within the Senate with authority to prepare a legislative program and a timetable for its discussion and disposition.

FILIBUSTERING

The Senate's difficulty in getting its business accomplished expeditiously was not, during the period under study, usually due to deliberate delaying tactics. Although such maneuvers were occasionally resorted to, they were not used frequently enough to give the Senate any trace of the notoriety which the filibuster later attached to the upper Chamber.[88]

The question underlying such tactics—whether, in the last analysis, a minority should have power to prevent the majority from taking action repugnant to the former—had been prominently discussed in America long before 1789. Various forms of obstruction had been practiced in most, if not all, the colonial assemblies. The subject was mentioned in the constitutional convention, where George Mason of Virginia claimed that beneficial results might come from systematic quorum-breaking in a legislature. Ratification of the Constitution was subjected to an unsuccessful filibuster in the Pennsylvania Legislature.[89]

On the other hand, a committee of the Congress of the Confederation had, in 1784, recommended stringent rules to prevent delays. June 3 having been designated as the adjournment date, the committee on May 17 pointed out the great amount of work confronting Congress in the remaining 2 weeks and recommended that *in this instance* the President be authorized to take the following action to speed up business:

> To take the sense of Congress with respect to putting any question without debate when he considered it desirable;
>
> To prevent any Member from speaking more than once or longer than the President deemed necessary;

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[86] *Senate Journal,* 5th Cong., 2d sess., July 14, 1798, p. 473.

[87] *Aurora,* Dec. 5, 1798.

[88] For the beginnings of Senate filibustering, see Franklin L. Burdette, *Filibustering in the Senate* (Princeton, N.J.: Princeton University Press, 1940).

[89] A review of obstructive legislative tactics from Roman times is found in Luce, *op, cit.,* pp. 277–296.

To prevent more than two Members from speaking on one side of any question, and

To finish each day's business regardless of the hour of adjournment.

The *Journals of the Continental Congress* do not record that the recommendations were adopted, but they are an interesting example of rules far more stringent than the Senate was ever to consider.[90]

Unlimited debate was obviously frowned upon by the first Senators since two of the standing rules of 1789 were designed to restrict unproductive talk. Rule IV provided that "no Member shall speak more than twice in any one debate on the same day, without leave of the Senate," while rule VI provided that "no motion shall be debated until the same shall be seconded." In his *Manual*, Jefferson included the British rule that "no one is to speak impertinently or beside the question, superfluously and tediously." [91]

Despite such precautions, delaying tactics were used in the Senate during its very first year. A bill to locate the National Capital on the Susquehanna was before the Senate on September 22, 1789, with only a few days remaining before the designated adjournment day. Since a motion to defeat the measure by postponement could muster only five votes, it was expected that the bill would pass. However, according to Maclay (who received the word from Chaplain Linn), the Virginia and South Carolina Senators were determined to "talk away the time so that we could not get the bill passed." The following day every endeavor was again made to waste time. The bill subsequently passed the Senate, however, with the location changed to Germantown, and was on the point of passing the House in that form. At that juncture Madison offered a slight amendment which, although meritorious in itself, was apparently offered in order to necessitate sending the bill back to the Senate, where it could be defeated. This obstructive device succeeded, since Congress adjourned before the Senate could pass the bill again.[92]

The following year the bill to fix the location of the Capital again occasioned dilatory tactics in both the Senate and the House. In the upper Chamber, opponents of Philadelphia as the Capital tried to spin out the time until the Rhode Island Senators could arrive and vote against that site.[93] In the lower House, meanwhile, supporters of Philadelphia faced a peculiar situation. On a rainy day, the Philadelphia bill was under consideration in that body. If the bill passed the House and was sent to the Senate before the rain stopped, its friends believed it would undoubtedly pass; if it reached the Senate after the rain stopped, it would be defeated. The explanation of this curious circumstance was that Senator Samuel Johnston, an opponent of the Philadelphia site, was ill and could not safely be carried to the floor in the rain to vote against the bill, but could and would if the rain had ceased. The Senate was so evenly divided that the ill Senator's vote could have meant the difference between victory and defeat. Supporters of the bill, therefore, tried to push the bill through the House while the rain continued. Gerry of Massachusetts and Smith of South Carolina thwarted the move, however, by making long speeches and dilatory motions which delayed the decision until the next morning.[94]

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[90] *Journals of the Continental Congress*, May 17, 1784, XXVII, 397–398.
[91] Jefferson's *Manual*, sec. XVII.
[92] Maclay, *op. cit.*, pp. 158, 168–169.
[93] Letter, Jefferson to William Short, June 6, 1790, Lipscomb, *op. cit.*, VIII, 34.

During the second (lameduck) session of the Second Congress, Oliver Wolcott claimed that the Republicans deliberately tried to stave off action on current issues on the theory that the next Congress would be more favorable to their views. On the other hand, the Republicans claimed that when the House was debating the appropriation to put into effect the Jay Treaty, Senate committees, especially those headed by Rufus King, deliberately delayed their reports as hostages to force favorable House action.[95]

Burdette stated that deliberately obstructive tactics were characteristic of the House of Representatives long before they became common in the upper Chamber. This he attributed partly to the Senate's small membership, partly to the dignity and polished politeness which characterized its proceedings, partly to the presence in the House of individuals like John Randolph of Roanoke whose temperaments prompted filibustering tactics, and finally to the assumption that it was in the lower Chamber that political prestige was greatest and the hardest legislative battles were fought.[96] This last explanation is not entirely convincing. It does not require a nearly evenly-divided House to make filibustering successful—in fact, such tactics are often most useful to a comparatively small minority which has no chance of achieving its objectives by normal legislative means.

The Senate's rule IX authorized use of the parliamentary device known as the "previous question"—a motion now generally used in parliamentary practice to shut off debate and bring about an immediate vote on the question before the house.

The framers of the 1789 Senate rules had in mind no such use of the device. The Congress of the Confederation, on the practice of which the Senators drew so heavily, specifically declared that the—

> previous question * * * shall only be admitted when, in the judgment of two States at least, the subject moved is in its nature or from the circumstances of time or place improper to be debated or decided—

in other words, to remove from consideration a pending motion and revert to the previous one.[97] Haynes went into the question at some length and showed conclusively that rule IX was actually adopted not as a means of shutting off debate but of removing from consideration a question which might seem to the majority undesirable to debate further or to act upon.[98] The committee framing the first Senate rules actually rejected one of Maclay's suggested rules which linked use of the previous question with tediousness of debate. Jefferson in his *Manual*, written while the 1789 rules were still in force, stated:

> The proper occasion for the Previous Question is when a subject is brought forward of a delicate nature as to high personages, &c. or the discussion of which may call forth observations which might be of injurious consequences. Then the Previous Question is proposed; and in the modern usage, the discussion of the Main [pending] Question is suspended, and the debate confined to the Previous Question. The use of it has been extended abusively to other cases. But in these it is an embarrassing procedure. Its uses would be as well an-

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[94] Letter, Fisher Ames to Thomas Dwight, June 11, 1790, Ames, *op. cit.*, I, 79–80.

[95] Letter, Oliver Wolcott, Jr., to Oliver Wolcott, Sr., Jan. 27, 1793, Gibbs, *op. cit.*, I, 85; entry dated Mar. 1, 1798, Jefferson's *Anas*, Lipscomb, *op. cit.*, I, 422.

[96] Burdette, *op. cit.*, pp. 14–15.

[97] *Journals of the Continental Congress*, May 4, 1781, XX, 479.

[98] Haynes, *Senate of the United States*, I, 392–394.

swered by other more simple parliamentary forms; and therefore it should not be favored, but restricted within as narrow limits as possible.[89]

The record does not indicate any serious effort during the period under study to write into the Senate rules machinery for cutting off tedious debate. Apparently dilatory tactics did not assume serious enough proportions to bring about a demand for restrictions on debate more drastic than those contained in Rules IV and VI, which provided that Senators were not to speak more than twice in any one debate on the same day without permission and that no motion could be debated until seconded. Although these first Senators did not establish filibustering as a characteristic feature of the Senate, they did not, on the other hand, adopt as a precedent any rule framed for the specific purpose of closing off all debate.

LOBBIES AND LOBBYISTS

Although pressures and pressure groups were not as highly organized during the period under study as they became later, men in cocked hats and knee breeches were just as adept at framing appeals to their Senators and Representatives and in finding their way about the Capitol lobby as are their more highly organized descendants.

The most usual and acceptable method of appealing to Members of Congress was through the petition or memorial. Such appeals were originated by widely diverse individuals and groups and embraced equally diverse requests or opinions. The shipwrights of Baltimore prayed that restrictions be placed in the first tariff act to effect the revival of their business. The merchants and traders of Portland desired abolition of the duty on molasses. The clerks in the Paymaster General's office petitioned for an increase in their pay. Citizens of Augusta, Ga., meeting in the local church resolved that vessels with letters of marque be authorized to retaliate against British attacks on American commerce. The Ohio Co. petitioned for legislative aid in making use of its reserved rights. Col. Anthony White sought reimbursement of money advanced to his command in 1780. Certain Delaware residents prayed for a more convenient office to license, register, and clear vessels. Chambers of commerce, Democratic Societies, taxpayers' committees, groups of veterans and militia officers, municipal officials, impromptu meetings, even grand juries petitioned for or against legislative action. Especially potent were memorials submitted by State legislatures. Some of the latter, particularly from Southern States, "directed" the Senators from the State involved to work for the object prescribed.

Where appropriate, committees were appointed to consider the recommendations set forth in petitions. Those dealing with subjects already under consideration were referred to the committee studying that subject. Sometimes such appeals resulted in the legislation sought.

Of course, all communications addressed to the Senate did not receive such sympathetic consideration. Petitions or resolutions critical of the Senate's majority or advocating a course of action contrary to that majority's policies were apt to be tabled. On the other hand, communications endorsing the policies of the Senate majority were received with evident satisfaction. On one occasion, an April day in 1798, "a large and respectable committee" representing Philadelphia citizens, on motion of Senator Samuel Livermore of New Hampshire, was admitted to the floor of the Senate to deliver in person and to hear read an address expressing the Philadelphians' "perfect and grateful approbation" of the administration's conduct in the embroilment with France. This was too much for Senator Humphrey Marshall of Kentucky, who obtained passage of a resolution providing that in the future no motion would be deemed in order to admit anyone whatever within the doors of the Senate Chamber to present any petition, memorial or address, or to hear any such read.[1]

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[89] Jefferson's *Manual*, sec. XXXIV.

But petitions and resolutions were far from the only means used to influence Senators during this period. Senator Maclay claimed that "treats, dinners, attentions" were used by New York merchants to obtain a delay in passage of the 1789 tariff bill until they had completed their imports of summer goods. He later claimed that New York influence (or British influence—to Maclay they were the same) was responsible for rejection of a clause discriminating against British goods.[2]

At least one veterans' group—officers of the Virginia line of the Continental Army—employed an official lobbyist (William Hull) to present the claims of ex-servicemen for additional compensation for their war services. He was apparently not the only lobbyist so employed, for in 1792 he wrote a circular letter to other veterans' groups inviting their cooperation and suggesting that they have their "agent or agents" present in the capital the following session for a concerted effort to obtain the supplemental compensation.[3] Senators and Representatives arriving at Congress Hall in Philadelphia were apt to be buttonholed by individuals representing themselves or others, eager to "give a hint to a Member, teaze or advise as may best suit."[4]

A more indirect method of influencing Members of Congress was to write letters to the newspapers, especially those of the National Capital, in the knowledge that they would be read by the legislators. Occasionally such communications were addressed as open letters to the Members or otherwise appealed explicitly for their attention, but more often they concentrated on lines of argument which the writers hoped would influence the Members' votes. Such letters or contributed articles often aroused considerable interest.

Occasionally a combination of different methods was used. For instance, in 1794 the glass manufacturers of Albany prepared a petition urging an increase in the duty on glass. A General Gordon was commissioned to present this petition to Congress. In addition, one of the businessmen wrote Senator Rufus King urging favorable action. He took the liberty of writing the Senator (and this has a familiar ring today) "in consequence of our former acquaintance."[5]

Various Senators had close friends and confidants with whom they carried on a steady correspondence and through whom they learned the sentiment of influential interests. A good example of such a correspondence was that between Senator King and Christopher Gore, who from 1789 to 1796 was United States district attorney for Massachusetts.[6]

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[1] *Senate Journal,* 5th Cong., 2d sess., Apr. 26, 1798, p. 251; Apr. 27, 1798, p. 255.
[2] Maclay, *op. cit.,* pp. 68, 96.
[3] *Gazette of the United States,* Apr. 21, 1792. The circular letter was written at Philadelphia on Apr. 16, 1792.
[4] *Ibid.,* Jan. 17, 1795.
[5] Letter, Elkanah Watson to King, Jan. 22, 1794, King, *op. cit.,* I, 543.

Sometimes Senators, far from objecting to having too many recommendations thrust on them, complained of lack of information on which to base their judgments. Maclay on one occasion observed that he had to vote "in the dark" on a bill involving Indian treaties. On another occasion he complained that the communications of the citizens of Philadelphia regarding the impost bill were directed to Senator Morris or to Representatives Clymer or Fitzsimons and not to him. "I regret that they furnish me with none of this information," he confided to his diary.[7] Senator Paine Wingate of New Hampshire on more than one occasion wrote the President(Governor) of New Hampshire requesting his or the local merchants' opinion on pending legislation.[8]

Throughout the period the Senate, and to a lesser extent the House of Representatives, were criticized for the allegedly undue influence of the Bank of the United States on their memberships. According to the critics, this improper influence was exercised through Members of Congress who were also directors of the bank.

A number of Federalist Senators did serve as bank directors during their Senate terms. Among them were George Cabot, Rufus King, Charles Carroll of Carrollton, Samuel Johnston, John Laurance, William Bingham, and Jacob Read.[9] That any of them used their dual role improperly to influence the Senate in connection with legislation affecting the bank would be difficult to prove. In view of their political orientation, they would no doubt have favored the bank even if they had not been on its board of directors. However, it is apparent that a conflict of interest did exist. Rufus King, who for 2 years was especially active as a director, carrying on a frequent correspondence with Hamilton regarding bank operations, seemed to believe that his position was somewhat anomalous. According to his grandson and biographer, he gave up his bank directorship in 1793 in order to be free to vote his convictions on a proposed constitutional amendment prohibiting Members of Congress from serving on the bank's board. At another place Charles R. King stated that his grandfather resigned his bank directorship when called upon as a Senator to vote on amendments to the bank charter.[10]

Opponents of the bank expressed themselves very bitterly against Members of Congress serving on the board. Referring to the legislation establishing the bank, Madison wrote Jefferson in 1791:

> Of all the shameful circumstances of this business, it is among the greatest to see the members of the Legislature [Congress] who were most active in pushing this Job, openly grasping its emoluments.[11]

Since the bank has been established by law and was a quasi-government institution, its opponents maintained that for Members of Congress to hold office under it was contrary at least to the spirit of the constitutional prohibition (art. I, sec. 6) against Senators or

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[6] King, *op. cit.*, I, *passim.*

[7] Maclay, *op. cit.*, p. 53.

[8] Letter, Wingate to President John Pickering, Apr. 27, 1789, Wingate, *op. cit.*, II, 299; Wingate to President Josiah Bartlett, Feb. 18, 1792, *ibid.*, II, 407.

[9] *Gazette of the United States, passim.*

[10] King, *op. cit.*, I, 397, 514.

[11] Letter, Madison to Jefferson, July 10, 1791, Hunt, *Writings of Madison,* VI, 55.

Representatives being appointed to any civil office under the authority of the United States created during their terms.[12] In 1793 they went so far as to propose a constitutional amendment denying seats in either House to persons interested in the management of *any* bank or financial corporation. The following year an amendment prohibiting Members of Congress from holding office in the Bank of the United States was defeated in the Senate by a vote of 13 to 12. The issue was still a live one 4 years later, when Jefferson observed with much displeasure that a bill for punishing forgeries of Bank of the United States paper was pushed toward passage by the votes of three Senators who were directors of the bank.[13]

It was part of the Federalist creed that Members of Congress should give courteous attention to the representations of their constituents but should not be controlled by them. It was the Members' duty to exercise independent judgment based on their own wisdom and the facts before them. Federalist leaders in the Senate looked with jaundiced eye at any tendency of a Senator—especially one on the Federalist side—so far to forget his dignity as a Senator of the United States as to court popularity or to be caught in the torrent of popular passions.[14]

The Federalists professed to believe that any extralegal political organization endeavoring to influence Government policy was a usurper of the prerogatives which belonged to Government alone. They declared that decisions on policy should be made by the legally constituted authorities and no one else. Senator Rufus King expressed this attitude in a letter to Hamilton in 1793:

> Our Chamber of Commerce will on Tuesday pass resolutions approving the [neutrality] proclamation, and we are resolved to try the citizens for a like purpose. But this is altogether wrong * * *. It was never expected [by the framers of the Constitution] that the Executive should sit with folded arms, that the government should be carried on by town meetings and those irregular measures which disorganize society, destroy the salutary influence of regular government and render the magistracy a mere pageant.[15]

The Senate Federalists the following year joined President Washington in condemning the "self-created" Democratic Societies, which were just the type of extralegal political organizations to which they objected—societies which endeavored, by their resolutions and other means of exercising pressure, to influence decisions which were the prerogative of Government alone. Few Federalist Senators saw, as Senator King did, their party's inconsistency in decrying, on the one hand, attempted political pressure emanating from groups of everyday citizens, while at the same time, when occasion demanded, utilizing for their own purposes political pressures exercised by chambers of commerce and other groups of the wealthier business interests. In 1796, Federalist leaders such as Senators Cabot, Ellsworth, and even King, used every means at their command—newspaper articles, resolutions, personal conversations, letters—to stir up business-group pressure on the House of Representatives to appropriate the funds necessary to put the Jay Treaty into effect.

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[12] For an example of many such objections, see the *National Gazette*, Feb. 6, 1792.

[13] King, *op. cit.*, I, 513–514; letter, Jefferson to Madison, June 21, 1798, Lipscomb, *op. cit.*, X, 53.

[14] For one expression of this point of view see letter John Adams to his wife, Apr. 1, 1794, Adams *Works*, I, 470.

[15] Letter, King to Hamilton, Aug. 3, 1793, King, *op. cit.*, I, 492–493.

The Senate's alleged imperviousness to public opinion was, of course, at the heart of the criticism it suffered during these years, as observed in previous chapters. Already, declared the *National Gazette* in 1793, the Senate had developed an *esprit de corps* which discouraged change through popular pressure. Because replacements were so gradual, the upper Chamber retained its principles from year to year. Neither public influence nor a sense of responsibility to the people penetrated its walls and therefore the gradual rotation of its personnel might never produce a change of measures.[16] The editor was wrong—within 10 years the Republicans were to capture control of the Senate. But that is another story.

THE SENATE AND PUNISHMENT FOR CONTEMPT

A year before the end of the period under study the Senate engaged in a furious debate regarding its power to punish a newspaper editor for contempt—a debate which was reflected by considerable agitation in the country at large.

The political ramifications of this controversy will be discussed in a later chapter, but it may be well at this point to consider the current thinking, pro and con, concerning the Senate's constitutional powers in this field.

William Duane, editor of the vitriolic Republican newspaper, the Philadelphia *General Advertiser* or—as it was usually called—the *Aurora*, on January 19, 1800, culminated a long record of intemperate attacks on Federalist men and measures by printing in full the text of the highly controversial Ross disputed-elections bill, a copy of which had been obtained by clandestine means. Duane claimed that plans for introduction of the bill had been laid by Senate Federalists in secret caucus with the purpose of corruptly frustrating the will of the people of Pennsylvania at the coming presidential election. He further asserted that the Federalist Senators appointed to prepare a bill had failed to consult Senator Charles Pinckney, only Republican on the committee. He went on to describe in detail a caucus allegedly held by 17 Senate Federalists in 1798 where plans were formed for complete control of the Senate by as few as 9 Senators (a majority of the 17, who in turn were a majority of the Senate).

The article so incensed the Senate Federalists that a week later they pushed through a motion authorizing appointment of a five-man committee of privileges. One of the party's leaders, Senator Uriah Tracy, then introduced a motion directing this committee to inquire who was the editor of the *Aurora*, by what means he had obtained a copy of the Ross bill, on what authority he published it as having passed the Senate, and what was the basis of his declaration that Pinckney had not been consulted and of his other accusations against the Senate and its Members. The committee was to have power to send for persons, papers, and records.[17]

Tracy's motion occasioned a fierce debate between Federalist and Republican Members. In the course of the discussion one Senator endeavored to substitute a motion directing the committee to inquire if the *Aurora* article was a "seditious libel against the Senate" and if so, if the Attorney General should be requested to prosecute the offending editor. This proposal to forego use of the power to call the accused directly to the bar of the Senate and to adopt the modern method of citing the accused and then submitting the case for prosecution by the courts was defeated by a party vote of 19 to 8. The original Tracy motion was then adopted by the same margin.[18]

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[16] *National Gazette*, Feb. 16, 1793.
[17] *Annals*, 6th Cong., 1st sess., Feb. 26, 1800, pp. 62–63.

Ten days later the Senate approved a resolution prepared by the committee to the effect that the *Aurora* article was—

> false, defamatory, scandalous, and malicious; tending to defame the Senate of the United States, and to bring them into contempt and disrepute, and to excite against them the hatred of the good people of the United States.

The following day the Senate approved the committee's further resolution stating that the article was a high breach of the privilege of the Senate. After the Senate had so determined, Duane was ordered to appear at the bar of the Senate on March 24 to "make any proper defense of his conduct." The editor heeded this summons and appeared on the appointed date. During this appearance he asked to be allowed the aid of counsel, a request which the Senate granted—under severe limitations. He was permitted the assistance of counsel while "personally attending at the bar of the Senate," and counsel would be heard "in denial of any facts * * * or in excuse and extenuation of his offense"—but could not challenge the Senate's jurisdiction in the case.[19]

In an effort to avail himself of this opportunity—or, perhaps, to set the stage for a further propaganda effort—Duane requested assistance from two prominent Republicans, men who were not likely to endear their client to the Senate—Alexander J. Dallas and the lawyer-scientist Thomas Cooper. Both Dallas and Cooper replied to Duane's request with letters stating that to act as counsel under the limitations prescribed by the Senate would be degrading, accompanying their refusal with attacks on the Senate's conduct obviously intended for a wide audience.

Rather than seek other counsel or appear without, Duane refused to reappear before the bar of the Senate on March 26, the designated date. Instead, he submitted to the Vice President (the sympathetic Thomas Jefferson) the Cooper and Dallas letters together with a letter of his own stating that since the Senate restrictions had deprived him of all professional assistance, he declined further attendance and left it up to the Senate to pursue such measures as it deemed desirable. The Senate responded by authorizing the committee of privileges to compel attendance of witnesses to give testimony regarding the case and directing it to report such testimony to the Senate.[20]

The Senate lost no time in taking action against Duane. The following day, by a strict party vote of 18 to 11, the Chamber approved a resolution reported by the committee through its chairman, Jonathan Dayton, of New Jersey, declaring that Duane was guilty of contempt, ordering the Sergeant at Arms to take him into custody, and providing that "all marshals, deputy marshals, and civil officers of the United States, and every other person, are hereby required to be aiding and assisting" the Sergeant at Arms in the execution of his warrant of arrest. It will be observed that here the legislative branch assumed it had authority to direct the activities of officers of the executive branch in a case of alleged breach of privilege.[21] Ironically, Thomas Jefferson as President of the Senate had no choice but to sign the warrant.

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[18] *Ibid.*, Mar 8, 1800, p. 105.
[19] *Ibid.*, Mar. 18, 1800, p. 111: Mar. 19, 1800, p. 111; Mar. 24, 1800, pp. 117-118.
[20] *Ibid.*, Mar. 26, 1800, pp. 121-122.

In the meantime the *Aurora* kept up a steady stream of denunciation. A long editorial in the March 29 issue, for instance, charged that "the aggrandizement of a few is the sole object of a part, a great number of which are invested with power, by intrigue, influence, prejudice, and terror * * *." Readers were reminded that it was early foreseen in the Constitutional Convention that combining in the Senate legislative, executive, and judicial powers would make that body tempting to men of "depraved ambition" who would seek to usurp the powers of the other branches and control the Government.[22]

One writer has stated that although the Senate ordered Duane's arrest, the Sergeant at Arms was secretly ordered not to find him. He cited Senator Stevens T. Mason, of Virginia, as his authority.[23] In any event, the Sergeant at Arms never did apprehend the recalcitrant editor although the latter remained in Philadelphia during this time, editing his paper and heaping invective on his persecutors.[24]

Their arbitrary action against Duane brought down on the heads of the Federalist Senators a torrent of opposition from the Republican press. Even some Federalists believed the Senate had gone too far. Petitions signed by numerous citizens protested the Senate's conduct and the principles upon which it was based.

The Senators may have been swayed by the public opinion they had aroused, or they may have realized that Duane was becoming a martyr to the Republican cause. At any rate, on the last day of the session they changed their tactics and passed, again by a straight party vote but in a greatly reduced House, a resolution requesting President Adams to instruct the proper law officer to prosecute Duane for "certain false, defamatory, scandalous, and malicious publications * * * tending to defame the Senate." [25]

Adams, who had no more reason to love Duane than did the Federalist Senators, immediately complied, instructing the Attorney General and the U.S. district attorney for Pennsylvania to begin suit against the editor.[26] Duane was, accordingly, brought to trial in Federal court in October 1800, on the charge of having committed sedition against the United States. However, Alexander J. Dallas, now serving as Duane's counsel, engaged in delaying tactics so successfully that a postponement was still in effect when Jefferson became President. The new President, who referred to the *Aurora* as "our comfort in the gloomiest days," ordered the suit against Duane under the Sedition Act dismissed, but to preserve the legal rights of the

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[21] *Ibid.*, Mar. 27, 1800, pp. 122–123.

[22] *Aurora*, Mar. 29, 1800.

[23] Irving Brant, "Reflections on the Troubles of Newbold Morris," *New Republic*, CXXVI (Mar. 31, 1952), 6.

For a discussion of these events which is extremely critical of the Senate majority, see an unpublished master's thesis by Loren C. Owings, "William Duane and the Philadelphia *Aurora*," University of California, Department of History, 1957.

[24] *Aurora*, March, April, May, 1800.

[25] *Annals*, 6th Cong., 1st sess., May 14, 1800, p. 184.

[26] Letters, Adams to Attorney General and to district attorney for Pennsylvania, May 16, 1800, Adams *Works*, IX, 56.

Senate directed that a new suit be brought against the editor. In the new political atmosphere the grand jury, as the Republicans expected, refused to indict. Thus ended the Senate's first contempt proceedings. In spite of the general obnoxiousness of the editor, the case brought no credit to the Senate.[27]

The debate in the Senate—and out of doors—occasioned by the effort to convict Duane revealed the dichotomy of current thinking concerning the power of the two branches of Congress to punish for contempt.[28]

The Federalists' case for prosecution and punishment of Duane by the Senate itself was based on a number of different sanctions. Senators Jacob Read and Samuel Dexter maintained that the English common law affecting crimes was in effect in the United States.[29] Others claimed that although the common law was not in full force in America, the law of commonsense and morality on which that law was based was in full effect. The right to punish for contempt, said they, was a law of nature—every body of men possessed the right of self-defense; every public agency, particularly, had the inherent right to perform all acts necessary to keep itself in a condition to discharge the trust confided to it. Whenever authority was given, the right to make that authority effective was given by necessary implication. If the Senate's tranquillity was to be perpetually disturbed by newspaper defamation, the Chamber could not function with the necessary coolness and deliberation.

The Federalists also based their position on the precedents of the British Parliament, even their opponents admitting that Parliament actually did exercise the right to punish for contempt. The majority Members also pointed to exercise of such powers by State legislatures and judicial courts to preserve the peace of their deliberations. They declared, moreover, that the Senate derived this power by implication from the Constitution. In defining its privileges, the Senate must govern itself according to the intent of that document, which was promotion of the general interests of the Nation's citizens. In so interpreting the Constitution, they could only be guided by sound discretion and commonsense.[30]

The House of Representatives on at least three occasions had already assumed the right to punish for contempt. In December 1795, the lower Chamber had confined two persons for attempting to corrupt the integrity of certain Members, which was interpreted as contempt and breach of the privileges of the House. The following March, the House decided that a challenge directed to a Member of that body was a breach of its privileges, but since satisfactory apologies were made, no further action was taken. In January 1800, just a few weeks before the inception of the Duane controversy, the youthful John Randolph of Roanoke, a Member of the House, wrote President Adams that he had been "grossly and publicly insulted" at the theater and threatened with physical violence by two military officers as a result of certain remarks he had made in a House debate. Adams transmitted the letter to the House in the belief that the incident came within the jurisdiction of that body itself. In the ensuing discussion, Randolph was censured for "betraying" the privileges of the House by calling on the President to defend them rather than leaving that task up to the House. The Chamber officially thanked the President for the respect he had shown its rights and privileges by referring the case to the House for action, but did not act against Randolph's alleged tormentors since there was much doubt about the actual facts relating to the incident.[31]

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[27] Frank L. Mott, *Jefferson and the Press* (University, La.: Louisiana State University Press, 1943), p. 50; W. C. Ford, *Jefferson and the Newspaper* ("Columbia Historical Society Records," vol. VIII [Washington: 1905]), pp. 93–94; John C. Miller, *Crisis in Freedom* (Boston: Little, Brown & Co., 1951), p. 202.

[28] The arguments pro and con are summarized in Jefferson's *Manual*, sec. III.

[29] Entry dated March 1800, Jefferson's *Anas*, Lipscomb, *op. cit.*, I, 434.

[30] This was one of the few Senate debates of the period to be reported in the *Annals*, and was included in that work because it was available from the files of the *Aurora*, Duane taking great pains to see that it was taken down in shorthand for publication in his paper. See *Annals*, 6th Cong., 1st sess., Mar. 5, 1800, pp. 68–96.

In denouncing the Federalists' action in the Duane case as a usurpation of power the Senate did not legally possess, the Republicans admitted that the British Parliament had, indeed, exercised such power, but declared that such precedents were so inadmissible in a free government such as that of the United States that the privileges of Congress had been severely circumscribed by the Constitution. The remonstrance submitted by Philadelphia citizens in Duane's behalf viewed with "surprise and regret" that the doctrines and practices of the privileged bodies of Europe were being adopted in this free country.[32] Moreover, Parliament and the courts of England had jurisdiction over contempts by the express provisions of law rather than by any inherent right. The State legislatures had such jurisdiction because their powers were plenary—that is, they enjoyed all powers not expressly denied them by the State constitutions, as contrasted to Congress, which possessed only such powers as were delegated to it by the Federal Constitution.

Republicans could not deny that the Constitution did grant Congress the right to perform all acts necessary to put into effective operation the powers granted, but they pointed out that the provision authorizing Congress "to make all laws necessary and proper for carrying into execution the powers vested by the Constitution" required the passage of *a law* before these powers could become effective. In other words, they claimed that the Senate had no power to punish for contempt until a law had been passed by both Houses and signed by the President prescribing how that power was to be exercised. Such a procedure would make it possible for one House or the President to check the other House if it tried to assume too broad privileges. If one branch could assume its own privileges without control, they warned, the condition of the citizen would be perilous indeed.

Some of the Republicans went further and declared that the fact Congress had not passed such legislation was proof that Congress had not supposed it possessed the power—quite ignoring its exercise by the lower House. The Republicans, of course, believed that the doctrine of implied powers had already been badly overstretched. They also pointed out that for the Senate to act independently of the courts would present the possibility of a judge releasing the culprit on a writ of habeas corpus and thus producing a clash between Senate and court.

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[31] *Annals*, 6th Cong., 1st sess., Jan. 14, 1800, pp. 372–374; Jan. 20, 1800, pp. 377–388; Jan. 24, 1800, pp. 430–49; Jan. 29, 1800, p. 504.

[32] *Aurora*, Mar. 28, 1800.

The minority naturally denounced the Federalists for attempting, in the action against Duane, first to define the crime and then to act as prosecutor, judge, jury, and "executioner." The Republican Senators and Duane's defenders outside emphasized that the action contemplated or taken against the editor violated constitutional guarantees of trial by jury in criminal prosecutions and the right of a man to be secure in his person and papers against unreasonable searches and seizures, to have process for witnesses in his own behalf, and to be *fully heard* by counsel in his defense. They also claimed that the action against Duane violated the prohibition against compelling a person in a criminal case to be a witness against himself. They assumed, in view of the stir made about the *Aurora* article, that the Federalists believed a crime had been committed. The ordinary courts of law were available and competent to punish all unjustifiable disturbances or defamations, courts in which the accused would enjoy all the proper safeguards.

Senator Pinckney declared that the principle of freedom of the press was involved. It was "glaringly improper" to commit an editor censuring Congress to the power of the Chamber he had censured. "Public bodies are public property," he maintained, "and so, indeed, are public men, who have in any degree rendered themselves conspicuous by their exertions * * *."

Vice President Jefferson, who presided over this debate, and who was at this very time preparing his famous *Manual*, after summarizing the arguments on both sides declared that only time could decide which of the two contrary doctrines would prevail.[33] In the meantime, he suggested that perhaps Congress, in its care for the safety of the citizen as well as for its own protection, would—

> declare by law what is necessary and proper to enable them [the members] to carry into execution the powers vested in them, and thereby hang up a rule for the inspection of all, which may direct the conduct of the citizen and at the same time test the judgments they shall themselves pronounce in their own case.[34]

The judgments Congress so pronounced were still being tested a century and a half later.

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[33] For the full text of these arguments, see *Annals*, 6th Cong., 1st sess., Mar. 5, 1800, pp. 68–96.

[34] Jefferson's *Manual*, sec. III.

CHAPTER XIII

THE COMMITTEE SYSTEM

INTRODUCTION OF BILLS

In contrast to the detours and delays described in the previous chapter, the Senate's committee system and the rules regarding the introduction of bills proved effective devices during this period for expediting the business of the Senate.

Of the bills originating in the Senate, only a relatively small proportion were introduced by individual Senators. Bills could be introduced by private Members only after permission had first been granted by a majority of the Senators present and only after 1 day's notice had been given of intention to request such permission (rule XII). Such permission was usually granted; in fact, unanimous consent was sometimes given to dispense with the 1-day waiting period. However, when a majority was plainly opposed to the object of a proposed bill, the Senators did not hesitate to deny permission to introduce it. Monroe's request to introduce a bill to suspend operation of the fourth article of the treaty of peace with Great Britain received only his own and John Taylor's votes in 1794. Senator Ray Greene's request for permission to introduce a bill to repeal the tax on stamped vellum was denied in 1798. Senator Stevens T. Mason's motion for leave to bring in a bill to amend the military organization act was turned down in 1800.[1]

Referring to the period 1789–1801 as a whole, the number of bills introduced by individual Senators tended to increase. In 1798, even the highly significant sedition bill was introduced by an individual Senator—James Lloyd of Maryland. However, the more usual means by which an individual Member started the legislative ball rolling was to move that a committee be appointed to report a bill to accomplish the object sought. Such a motion might, or might not, contain the names of the committee members desired. Acceptance of the motion would be an important step forward in securing Senate approval of the proposed legislation; rejection would effectively quash such legislation for the current session.[2]

An important result of such obstacles to introduction of bills by individual Members was strictly to limit the number of bills introduced. Such bills as were introduced usually had a fair chance of passing, since their purpose had generally received some sort of preliminary approval. In the first session of the First Congress, for example, only four bills were introduced in the Senate, all of which passed that body. In the first session of the Fourth Congress, the Senate passed 13 of the 18 bills introduced in that Chamber. In the second session of the Sixth Congress, the Senate originated only four bills and passed three of them. It is obvious that it was virtually impossible under such a system to indulge in the practice so common today of Senators introducing bills that have no chance of passage merely to satisfy interests which Senators desire not to offend.

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[1] *Senate Journal*, 3d Cong., 1st sess., May 6, 1794, p. 127; *ibid.*, 5th Cong., 2d sess., Jan. 17, 1798, pp. 71–72; *Annals*, 6th Cong., 1st sess., Apr. 2, 1800, p. 149.

[2] The generalizations contained here regarding introduction of bills and those in the following section concerning uses of the Senate committee are the result of study of the *Journal* and the *Annals* for the period covered.

USES OF THE SENATE COMMITTEE

Through service in the Congress of the Confederation and various State assemblies, the Senators of this period were so accustomed to the committee method of doing business that they were inclined to take it for granted. Only one of the Senate's first rules—rule XV dealing with method of appointment—dealt with this important phase of Senate activity.

But the committee system employed in that day differed materially from the standing-committee system which developed later. To the modern student, accustomed to the rigidity of the latter system, the most striking feature of the earlier order was its remarkable flexibility. With such exceptions as shall be noted in a moment, all Senate committees during this period were *ad hoc*—that is, they were appointed for a specific purpose, and when that purpose had been accomplished the committee passed out of existence.

This meant, first of all, that the number of committees named during a session was very large—in the first session of the Fourth Congress, for example, there were about 90, including conference committees. The *ad hoc* system also meant that committees were readily responsive to the Senate as a whole; there were no standing committees or permanent chairmen with semi-independent spheres of authority inclined to resist the power of the parent body. Being under the full and immediate control of the parent body, committees could be used for a wide variety of purposes as the needs of the moment might dictate, and could be called into the legislative process at any point.

A few examples will illustrate this flexibility and the wide variety of uses to which committees were put:

By motion from the floor, a committee might be named for the express purpose of initiating a bill on a given subject, as noted above.

The Senate might debate a subject at length on the floor, and after the majority's desires had been crystallized, might appoint a committee to put those desires into bill form.

Upon receipt of a bill from the House, the entire bill might immediately be referred to a committee, a part of it only might be so referred, or the Senate might choose to debate the bill first, adopt amendments, and then refer it to a committee to be put into the revised form. Or, if the Senators were satisfied with the bill as it arrived from the House, they might pass it with no reference to committee at all.

The Senate might give a committee specific instructions as to the kind of bill or amendments to prepare. On the other hand, it might direct a committee to study a broad subject and report such bill or bills as its members might deem desirable. For instance, in 1794, a five-man committee was directed to study the military needs of the United States and report whatever bill or bills were necessary to promote the Nation's defense. Five years later, during the difficulties with France, Senate Federalists brought about the appointment of a so-called "grand committee" which initiated an extensive legislative program to build up the military forces and otherwise meet the Gallic threat.[3]

It was a common practice for the Senate to refer to committees various sections of the President's message to Congress with instructions to report what legislation, if any, was required. Petitions or memorials submitted to the Senate were often likewise submitted to committees to determine whether or not they merited Senate action.

A committee might submit its findings to the Senate in the form of a bill or a report. In the latter case, the Senate might debate the report, accept it *in toto* or adopt amendments, and then return it to the committee with instructions to write a bill conformable thereto.[4]

Occasionally a bill would be prepared by one committee and then referred to another committee for study.[5]

A committee might be appointed to study and report on a single amendment, an entire bill, or several bills—usually on the same general subject but sometimes on widely different subjects. In the Third Congress a three-man committee was directed to bring in bills on four distinct subjects—settlement of loan officers' accounts, mitigation of fines incurred under revenue laws, the domestic debt of the United States, and relief from imprisonment for debt.[6]

Sometimes committees were appointed to consider the President's nominations to Federal offices; at other times nominations were approved without reference to committee. Jefferson wrote in 1798 that Adams withdrew certain nominations on the basis of information brought out by a Senate committee.[7]

Committees were also used for purposes not directly involving legislation, such as preparing or delivering messages from the Senate to the President.

The only *bona fide* standing committee authorized by the Senate during the period under discussion was the joint Senate-House Committee on Enrolled Bills. An administrative rather than a strictly legislative committee, it was charged with the task of examining each enrolled bill, making necessary technical corrections, reporting thereon to both Houses, and after signature by the Speaker and Vice President, presenting the bill to the President. At first the committee was composed of two House Members and one Senator, but later a second Senator was added. Membership on this committee was apparently considered a chore rather than an honor since freshman Senators were invariably chosen.[8] The 1800 "committee on privileges," although sometimes referred to as a standing committee, was in reality a temporary committee for investigating William Duane and the *Aurora*.

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[3] *Senate Journal*, 2d Cong., 1st sess., Mar. 20, 1792, p. 160; *ibid.*, 5th Cong., 2d sess., Nov. 29, 1797, p. 26.

[4] *Ibid.*, 3d Cong., 1st sess., Mar. 18, 1794, p. 85; *ibid.*, 3d Cong., 2d sess., Feb. 20, 1795, p. 75.

[5] *Ibid.*, 4th Cong., 1st sess., Dec. 16–28, 1795, pp. 28 ff.

[6] *Ibid.*, 3d Cong., 1st sess., May 22, 1794, p. 147.

[7] Letter, Jefferson to Madison, May 3, 1798, Lipscomb, *op. cit.*, X, 36.

[8] *Senate Journal*, 1st Cong., 1st sess., Aug. 6, 1789, p. 88; *ibid.*, 6th Cong., 1st sess., Feb. 17, 1800, p. 96, and *ibid.*, *passim*.

COMPOSITION OF SENATE COMMITTEES

Although only one standing committee was authorized during the period, experience soon proved the utility of referring bills on one general subject to approximately the same group of Senators, thus taking advantage of their familiarity with that field of interest. During the First Congress, a large proportion of the private claims bills were referred to Senators Maclay, Wingate, and Elmer, who apparently comprised an informal committee on claims, while questions involving the expenditure of money were often referred to a handful of Senators who had developed the reputation of being "watchdogs of the Treasury."[9] During the following sessions, bills dealing with commerce and shipping were usually referred to Senators such as Dalton, Robert Morris, and Langdon, who had had wide experience in mercantile affairs. Ellsworth, principal author of the first judiciary act, was a member of practically every committee from 1789 to 1796 dealing with any aspect of the judiciary. In 1796, the same five-man committee was utilized to consider the House bills appropriating funds for the treaty with Spain, the treaty with the Indians beyond the Ohio, the treaty with Algiers, and the Jay Treaty with Great Britain.[10]

Tracing the genesis of the Senate Committee on Foreign Relations, Ralston Hayden pointed out that in the consideration of 19 treaties during the first four Congresses, the Senate employed 19 committees with a total membership of 68. Yet these 68 committee places were filled by only 24 Senators—about a third of the 66 Senators who served during these 8 years. Moreover, of these 24, 5 held more than half of the 68 places. These five were all Federalist leaders—Caleb Strong, Robert Morris, Rufus King, Oliver Ellsworth, and George Cabot. In addition, these Senators were primarily responsible for the Jay Treaty, from inception to ratification, despite the fact that the Senate appointed no formal committee on that issue. Hayden concluded that the Senate concentrated responsibility in the foreign-relations field in the hands of this comparatively small group of Senators not in accordance with any rule or fixed precedent—perhaps not even consciously—but simply because it was the easiest method of transacting this kind of business.[11]

As early as 1801, this tendency to commit bills involving one general subject to the same group of Senators was formalized in a standing rule:

> When any subject or matter shall have been referred to a select committee, any other subject of a similar nature, may, on motion, be referred to such committee.[12]

The more than two score committees named during the Senate's first session ranged in membership from 2 to 11. During that session the entire Senate membership was divided between the committee preparing the bill to organize the Federal judiciary and the committee to write legislation defining punishment of crimes against the United States—no two members from any State serving on the same one. In the case of the former measure, at least, a subcommittee was appointed to do the actual drafting.[13] The committee on the bill fixing the President's salary also included one Member from each State. About one-fourth of the remaining committees had five Members each, the remainder three, or, in a few cases not involving the preparation of bills, two Members.

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[9] Wingate, *op. cit.*, II, 343–393, gives a number of examples.

[10] *Senate Journal*, 4th Cong., 1st sess., *passim*.

[11] Hayden, *op. cit.*, pp. 171–172.

[12] Haynes, *Senate of the U.S.*, I, 272. This became rule XIV in the 1806 revision of the Senate rules.

The Senate in 1807 added a standing committee to audit and control contingent expenses. In 1816 a rule was adopted providing for 11 standing committees to be appointed each session. See Gilfry, *op. cit.*, p. 194. The House of Representatives initiated the standing-committee system much earlier. By 1795 its rules called for four standing committees—elections, claims, commerce and manufactures, and revisal and unfinished business, in addition to House membership on the joint committee on enrolled bills. See *Annals*, 4th Cong., 1st sess., Dec. 14, 1795, p. 140.

Thereafter, when the subject to be considered involved specifically the interests of each State—such as establishment of postoffices and postroads—committees were occasionally appointed which included a Member from each State. However, as time went on, the number of Members on committees was standardized at three for most purposes and five for the most important matters. In 1796 the Senate rejected a motion to include one Member from each State on a committee to consider the admission of Tennessee to the Union. A motion to set the membership at five was also defeated, and a committee of three Members—all Federalists—was finally appointed. Apparently the Republicans desired a larger committee in order to give them some representation.[14]

Rule XV adopted in 1789 provided that all committees were to be elected by ballot, a pluralty resulting in election. Commenting on the method employed in that year, Maclay wrote:

> Instead of directing two Senators to read the ballots for committee-men, as he [Vice-President Adams] did heretofore, he this day read them aloud from the chair, and the Clerk tallied.[15]

Since committees were so numerous and since they were dissolved after making their reports, the office of committee chairman did not involve the power and prestige that it does now. Jefferson's *Manual* implied that the person named first was generally the chairman, but only as a matter of courtesy, since each committee had the right to elect its own chairman.[16]

John Quincy Adams in 1808 stated that the prevailing practice was for the Senator with the most votes to be the chairman. When an individual member obtained consent to introduce a bill, he was usually—but not always—named chairman of the committee to consider it. Senators of the minority party sometimes served as chairmen in connection with bills not involving party issues.

It was the chairman's duty to submit to the Senate the committee's report, to explain the reasons for any amendments the committee had made in a bill, and otherwise to defend the committee's actions.[17]

The composition of committee memberships was as flexible and varied as the purposes for which the committees were named. There were only a few informal restrictions on choice of committee personnel. Ordinarily, two Senators from the same State would not be named to the same committee.[18] When an individual Senator obtained permission to introduce a bill, he was almost always placed on the committee named to consider it. In cases of legislation dealing exclusively with a problem within a given State, that State was almost invariably represented. A westerner was generally included on committees dealing with the frontier.

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[13] Maclay, *op. cit.*, p. 30.
[14] *Senate Journal*, 4th Cong., 1st sess., Apr. 14, 1796, pp. 171–172.
[15] Maclay, *op. cit.*, p. 32.
[16] Jefferson's *Manual*, sec. XI.
[17] Haynes, *Senate of the U.S.*, I, 294, citing John Quincy Adams, *Memoirs*, I, 482; Jefferson's *Manual*, sec. XXVII; Maclay, *op. cit.*, p. 273.

COMMITTEES AND PARTY POLITICS

Following the British precedent, a Senator who opposed the basic purpose of a bill was not to be appointed to the committee considering it, on the theory that a "child is not to be put to a nurse that cares not for it." However, this rule did not extend to a Senator who merely took exception to some detail in the bill.[19] Members of the committee were expected to defend its work on the floor, although they did not always do so. Senator Richard Henry Lee, a member of the committee preparing the first judiciary act, tried to amend it radically when it came up for discussion on the floor and finally voted against it, as did Maclay and Wingate, who were also members of the committee. However, this was a rather unusual committee, including as it did a Member from each State. When Maclay himself was chairman of a committee and reported out a bill, he accused Wingate of "behaving dirty" when the latter (who was a member of the committee) expressed on the floor sentiments contrary to the terms of the committee report.[20]

The requirement excluding opponents of a measure from the committee considering it gave the Senate's Federalist majority a legitimate excuse for excluding Republicans from committees considering bills involving party issues. Many important committees during this period consequently included no Republicans at all. In 1790 Hamilton's friends made certain that no opponents of the Secretary's program were named to the committee preparing the bill to establish the Bank of the United States. The "grand committee" appointed in November 1797 to prepare defense measures in the quasi-war with France was solidly Federalist. Referring to the legislation of that year, a contemporary observer remarked that—

> By a previous arrangement they have left out of the committees every one of the minority to shew them that they have no confidence in them and are afraid to trust them at this crisis.[21]

The Federalists apparently even felt that Republicans, whose party press had been bitterly critical of Washington, were not fit persons to represent the Senate on a joint committee to prepare suitable expressions of the sorrow of Congress on the first President's death.[22]

Republicans were not, however, invariably excluded from committees considering questions of partisan import, as witnessed by the fact that the seven-man committee on elections to which was referred the petition challenging Gallatin's eligibility included two staunch

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[18] Occasionally two Senators from one State served on the same committee when the subject was of limited scope, such as private relief legislation, or when a measure affected that State exclusively.

[19] Jefferson's *Manual*, sec. XXVI.

[20] Wingate, *op. cit.*, II, 323, 360; Maclay, *op. cit.*, p. 260.

[21] Ulrich B. Phillips (ed.), "South Carolina Federalist Correspondence, 1789-1797," *American Historical Review* XIV (July 1909), 789.

[22] *Annals*, 6th Cong., 1st sess., Dec. 19, 1799, p. 30.

Republicans and one Senator who might be termed an independent. Nevertheless, the net result of these practices was that Senators of the minority party were usually, though not invariably, confined to service on committees considering questions on which party lines were not strictly drawn—which often meant questions of secondary importance.

Excluding the minority from important committees was not considered unsportsmanlike or unobjective, because committees were regarded merely as instrumentalities to accomplish the purposes of the Senate majority. The minority would have full opportunity to present its viewpoint when a measure came up on the floor for action by the parent body. Even within the majority party it was the custom to appoint only those Senators who could be depended upon most perfectly to effectuate the Senate's desires with respect to legislation under consideration. When the congressional salary bill was being discussed, Maclay wrote:

> Mr. King got up, said the matter seemed of a delicate nature, and moved for a committee to whom the bill might be referred. This obtained, and a committee of five were appointed. By the complexion of the committee it would seem the Senate want their wages enlarged.[23]

Slates of candidates for membership on a committee were often prepared in advance by interested groups of Senators, later by the majority party in caucus. During discussion of the bill fixing the location of the Capital, Maclay regretted the temporary absence of Robert Morris.

> Had he been there in time, I could have settled with him who should have been the committee. Now we could communicate only with our friends on one side of the House. * * * I got into chat with him, and after some time remarked how unfortunate we had been yesterday in not prearranging a ticket for the committee.[24]

The next month, when Maclay found that Hamilton's "gladiators" were doing the same thing, Maclay was thoroughly disgusted.

> But I can not see that I can do any further good in this place, and I think I had better go home. Everything, even to the naming of a committee, is prearranged by Hamilton and his group of speculators.[25]

Jefferson claimed that in 1797, when party feelings were high, the Federalist majority held a caucus, took up all the points in President Adams' message (except revenue legislation, which had to originate in the House), prepared the slate of every committee to consider these recommendations, and then pushed these slates through the Senate by uniform votes.[26]

Election of committees under these circumstances meant that the States represented by the most active Federalist Senators were heavily overrepresented on significant committees. Connecticut, especially—consistently Federalist and boasting such energetic Senators as Oliver Ellsworth and Uriah Tracy—exerted far more influence in Senate committees during this period than its small size would lead one to expect.

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[23] Maclay, *op. cit.*, p. 135.
[24] *Ibid.*, p. 281.
[25] *Ibid.*, p. 331.
[26] Letter, Jefferson to Madison, June 1, 1797, Lipscomb, *op. cit.*, IX, 393.

Disadvantages of the "Ad Hoc" System

This *ad hoc* committee system had the advantages of great flexibility and of responsiveness to the will of the Senate as a whole. Under this system there was no possibility of the Senate being—as Woodrow Wilson nearly a century later found it to be—many "little legislatures" with powers and prerogatives relatively independent of the parent body. Committees were the servants, not the masters of the Senate. They were appointed for the express purpose of accomplishing the will of the majority and were at all points subject to its will.

However, the system had two serious disadvantages. In the first place, there was a considerable amount of duplication of effort. The members of one committee would thoroughly acquaint themselves with a given subject, but when opportunity came to put this information to further use in connection with a new measure on the same general subject, some of these members would find themselves excluded from the committee named to consider it. As pointed out previously, this objection was never fully applicable since there was a tendency to commit bills to Senators who had previously served on committees in the same general field, but there was, nevertheless, a far greater loss of information and experience than results under the standing committee system.

An even more serious disadvantage of the *ad hoc* committee system was the resulting maldistribution of the Senate workload. In session after session a handful of Senators bore the major share of the burden of committee work while others were apparently content merely to attend sessions and vote. The disparity in committee assignments from Senator to Senator was astonishing. The following table, prepared from the *Senate Journal*, shows the distribution of such assignments during the second session of the Third Congress, but illustrates a situation which existed, in greater or lesser degree, in each of the sessions under study:

Senator	*Committee assignments*
Oliver Ellsworth, Connecticut	23
Rufus King, New York	16
Aaron Burr, New York	16
George Cabot, Massachusetts	14
Caleb Strong, Massachusetts	12
John Langdon, New Hampshire	10
Samuel Livermore, New Hampshire	9
John Rutherfurd, New Jersey	9
William Bradford, Rhode Island	9
James Jackson, Georgia	8
Benjamin Hawkins, North Carolina	8
Richard Potts, Maryland	8
James Ross, Pennsylvania	8
Frederick Frelinghuysen, New Jersey	6
Ralph Izard, South Carolina	6
Stephen R. Bradley, Vermont	6
Robert Morris, Pennsylvania	5
Theodore Foster, Rhode Island	5
Stephen M. Mitchell, Connecticut	4
John Brown, Kentucky	4
Henry Tazewell, Virginia	3
John Vining, Delaware	1
John Edwards, Kentucky	1
Henry Latimer, Delaware	0
James Gunn, Georgia	0
John Henry, Maryland	0
Alexander Martin, North Carolina	0
Pierce Butler, South Carolina	0
Moses Robinson, Vermont	0
Stevens T. Mason, Virginia	0

This table calls for some explanation. For some reason, Latimer and Gunn did not report until the session was nearly over; Mason did not report at all. Butler was ill. Henry for some reason was absent during most of the session. Izard and Morris, who served on only a handful of committees during this session, were among the most active Senators in other years.[27] There may be reasonable explanations why some of the other Senators did not contribute more to committee work. There may have been other cases of ill health. However, the *Senate Journal* shows that Senators such as Martin, Robinson, and Edwards, who served on either a single committee or none at all, were present and voted at most of the rollcall votes during the session. Even allowing for mitigating circumstances, it is clear that the spadework of the session was extremely unevenly distributed.

During his 7-year Senate service, Ellsworth consistently served on more committees than any of his colleagues. He began displaying this leadership and industry at the Senate's very first session, when he served on 22 committees, compared to 20 for Robert Morris, 16 for Richard Henry Lee, 15 for Izard, and a far lesser number for most of his other colleagues. In the 1790 session, Ellsworth served on 36 committees compared to an average of about 11 each for his colleagues. It was quite common for Senators who were present during most or all of a session to serve on only one or two committees apiece. Such maldistribution of assignments was repeated session after session.

This disparity cannot be explained entirely by the policy of excluding members of the minority from committees considering bills involving party issues, although that policy contributed to it. Republicans such as Burr and Langdon served on a large number of committees, while some Federalists were among the least active. The answer must lie in the energy, industry, and devotion to duty of the various Senators. Furthermore, the system was something of a popularity contest, as described by John Quincy Adams in 1805:

> As our committees are all chosen by ballot, the influence and weight of a member can be very well measured by the number and importance of those upon which he is placed. In this respect I have no excitements of vanity. But, as much of the labor of business is transacted in committees, an exemption from those which are important is also an exemption from toil, and leaves proportionable leisure.[28]

Seniority played very little part in assignments to committees, except that the chore of serving on the committee on enrolled bills was given to freshman Senators. Seniority could not, of course, be a factor at the beginning of the Senate's existence. However, as some of the first Senators retired and others took their place, there is no evidence that the new Members received any less consideration than their colleagues with greater seniority.

For instance, during the second session of the Fifth Congress, some of the most significant committee assignments went to Senators Goodhue, Laurance, and Tracy, none of whom had served more than a year and a half. During the second session of the Sixth Congress, the three appropriation bills—among the most important measures of the session—were committed to Tracy, Dayton, and Langdon, who had served 4, 2, and 12 years, respectively. Far more significant than seniority were the Senators' personal characteristics and standing in the Federalist Party.

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[27] Since there were twice as many Federalists as anti-administration Senators during this session, this table does not dramatize the heavy preponderance of Federalists on the average committee. On the other hand, because of his vigor and application to duty, Burr was assigned to more committees than was usual for Members of the minority.

[28] Charles Francis Adams (ed.), *Memoirs of John Quincy Adams* (Philadelphia: J. B. Lippincott & Co., 1874–77), I, 329–330.

COMMITTEE MEETINGS

Committees met before and after the sittings of the Senate; precedent forbade meetings while the parent body was in session. Other Members could attend the meetings, but could not, of course, vote.[29] The records of the period contain few references to committees inviting outsiders to testify, although this was sometimes done. Maclay mentions that a committee considering the pension claim of a Colonel Ely heard testimony from the claimant.[30] While Secretary of State, Jefferson, upon the invitation of Senator Strong, attended an evening committee meeting in the Senate Chamber to discuss certain nominations of diplomatic officers. On another occasion, Jefferson, at the request of Senator Rutherfurd, submitted recommendations on a system of weights and measures to a Senate committee by letter.[31] Alexander Hamilton influenced the legislative process at almost every stage, sometimes arranging for the membership of committees, in some cases attending committee meetings, often buttonholing individual Members to organize support for his measures. His reports to the Senate as a whole will be discussed in chapter XV below.

A few weeks after the Senate formed its first quorum it adopted a resolution providing for use of the Committee of the Whole.

> *Resolved*—That all bills on a second reading shall be considered in the same manner as if the Senate were in Committee of the Whole, before they shall be taken up and proceeded on by the Senate according to the standing rules, unless otherwise ordered.

Thereafter, the *Senate Journal* and the *Annals of Congress* rarely mention the Senate going into Committee of the Whole, but it can be presumed that the above rule was followed.[32] The device had often been used by the Congress of the Confederation, of which many of the Senators had been members. Maclay referred to the Senate using it, but recorded with some irritation that Vice President Adams refused to vacate the chair in favor of a committee chairman. In a body as small and informal as the Senate was at that time, there could be few contrasts between procedures of the Senate in Committee of the Whole and in ordinary session, in spite of the rather elaborate rules for the Committee of the Whole detailed in Jefferson's *Manual*.[33]

THE CONFERENCE COMMITTEE

Experience in bicameral State legislatures had made many of the Senators and House Members well acquainted with the conference-committee system of reconciling differences between upper and lower chambers. It is not surprising, therefore, that the system was taken for granted from the very beginning of the bicameral Federal Congress.

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[29] Jefferson's *Manual*, secs. XI, XXVI.

[30] Maclay, *op. cit.*, p. 257.

[31] Jefferson memorandum dated Jan. 4, 1792, Lipscomb, *op. cit.*, XVII, 314; letter Jefferson to Rutherfurd, Dec. 25, 1792, *ibid.*, VIII, 1–6.

[32] *Senate Journal*, 1st Cong., 1st sess., May 21, 1789, p. 28.

[33] Maclay, *op. cit.*, p. 49; Jefferson's *Manual*, secs. XII, XXVI, and XXX.

Ada C. McCown, in chapters III and IV of her monograph *The Congressional Conference Committee*, published by Columbia University in 1927, discussed in detail the use of the conference by the First Congress and the development of the system during the years immediately following. She showed that the system was used effectively from the very beginning, sometimes inducing one House and sometimes the other to recede from disagreement so that the Government might not be crippled for lack of laws or appropriations. She concluded that Congress' first use of the conference was solely to bring about agreement between the two Houses and was not diverted to either the unfortunate or constructive additional purposes of a later day. After listing the "distinct understandings and practices" which have augmented the conference committee's power, she showed where these factors were—and were not—present in this early period.

The first of the present-day practices augmenting the power of the conference is that of insisting that conference reports cannot be amended but must be accepted as a whole or not at all. In this respect, the early Senate usually came nearer the modern practice than did the House. In 1796 a motion to amend a conference report was ruled out of order in the Senate. The House, on the other hand, at least as late as 1804, refused to accept such a point of order.

The second of these practices is that of drawing up conference reports in secret. That custom was not followed in these early years—in fact, during the first conference on a legislative disagreement so many Members deserted their respective Chambers to attend the conference that little business was done on the floor of either House that day.[34]

Further current practices listed by Miss McCown as augmenting the conference committee's power are those of delaying submission of conference reports until the last hours of a session—when there is scarcely time to examine them, let alone send them back if unacceptable—and of assigning such reports the highest privilege of precedence. Miss McCown found that these practices were not used in this early period, a conclusion borne out by the records.

However, her explanation of this fact—that there was little congestion at the close of the sessions and few crowded calendars in that era—is open to reservation in view of the fact that early Congresses consistently left a major share of the session's decisions until the closing hours, as mentioned in the previous chapter. It is more likely that the reason conference committees did not take advantage of the close-of-session rush in the earlier period to enhance their own power was that in that day all committees were more responsive to the parent body and had not yet developed the spirit of quasi-independence which appeared at a later day. During the time when *ad hoc* committees were the rule, appointing a committee of conference was not considered in much different light from appointing a committee for any other purpose—and all committees were expected to serve, as perfectly as they could, the purposes of the majority of the parent body.

The final factor in the development of the present powers of the conference committee mentioned by Miss McCown and pertinent to the present study is the custom of each Chamber choosing managers by seniority from the committees in charge of the bill, a practice resulting in a small group of men serving as conferees on nearly all important legislation. Miss McCown pointed out that from the very beginning it was the Senate's practice to choose managers from a comparatively small group, Senator Ellsworth during the first three Congresses and Senator Tracy during the Fifth and Seventh serving on almost every conference committee.

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[34] *Annals*, 1st Cong., 1st sess., June 26, 1789, p. 631; Maclay, *op. cit.*, p. 89.

It is, indeed, true that the names of a small number of Senators appeared on one conference committee after another during this early period. However, it should be emphasized that this was so because these Senators were more active in committee work as a whole than their colleagues. It very early became the custom—although not the invariable rule—for the Senate to appoint one or both of its conferees from the committee which reported the bill to the Senate. Almost always the chairman of the latter committee was included. Since Senators like Ellsworth and Tracy served on more committees, it was inevitable that they would also serve on more conferences.

In view of the later controversy over the point, it is significant that in at least one instance during this early period a conference committee inserted new matter in its report. Both Houses had, in 1790, agreed to a sum of $30,000 to pay the expenses of American ministers abroad. The conference committee increased the amount to $40,000. As Miss McCown pointed out, the manner of defending the committee's action was as interesting as the action itself—the committee had not relied on its own judgment but had consulted the Secretary of Foreign Affairs—a clear case of the executive branch exerting influence on legislation in the conference stage. In spite of criticism of the committee for allegedly exceeding its authority, the larger amount was subsequently approved by both Houses.[35]

Beginning with its very first session Congress used the conference system with good success, although occasionally a bill—such as the 1790 measure establishing post offices and post roads—was defeated through failure to agree on a conference report. In the last session under study, the second session of the Sixth Congress, there were no conferences, the House in almost every case of disagreement accepting the Senate amendments.[36]

JOINT COMMITTEES

When the First Congress began its duties in 1789, many Senators apparently hoped that much congressional business could be accomplished through joint Senate-House committees. Consequently, Senate committees were appointed to meet with parallel House committees to consider not only joint Senate-House activities such as rules to govern conferences, election of chaplains, and processing of the acts of Congress, but also activities which could be accomplished by the Houses independently, such as presenting addresses and other acts to the President of the United States.

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[35] *Annals*, 1st Cong., 2d sess., June 25, 1790, p. 1709.

[36] *Journals*, 6th Cong., 2d sess., *passim*.
At first three Senate conferees were often appointed, but the number was soon standardized at two.

The Senate's lordly airs, expressed in the demand for higher pay and other marks of superior dignity, apparently so provoked the House as to discourage further exploration of the possibilities of joint action. The two Houses did occasionally appoint joint committees toward the close of a session to set a date for adjournment and to report what further business ought to be accomplished before that day, but the House repeatedly rejected with scorn Senate attempts to bring about appointment of a joint committee early enough to prepare a schedule of business for the entire session.[37] As a consequence, joint committees during this period were usually limited to dispatching the necessary routine business between the two Houses and to arranging ceremonies in which Congress had a part.

CONGRESSIONAL INVESTIGATIONS

During the period under study, the House of Representatives conducted a number of formal investigations. In 1790, the lower chamber through a committee complied with Robert Morris' appeal for an investigation of his conduct as superintendent of finance in the pre-Constitution period. Two years later, a House committee conducted the investigation of the St. Clair disaster. In 1795, the House itself investigated bribery charges against Robert Randall and Charles Whitney. In 1797, a House committee conducted the inquiry which led to impeachment proceedings against Senator William Blount. In 1800–1801, a House committee investigated charges against Winthrop Sargent, Governor of Mississippi Territory. In December 1800, the House through a committee complied with the request of Oliver Wolcott for an investigation of his conduct as Secretary of the Treasury. Two months later another House committee inquired into the cases of fires which destroyed many of the papers of the Treasury and War Departments.

During these first 12 years the Senate conducted no such formal investigation, aside from the inquiry which led to expulsion of Senator Blount and the interrogation of *Aurora* editor William Duane, cases in which the Senate itself was immediately concerned. The implications of the congressional investigatory power are, therefore, outside the scope of this study, with one significant exception—the question why the lower Chamber during this period monopolized this important power to the exclusion of the Senate, a power which in later years came to be wielded most effectively by the upper Chamber. This question can, perhaps, be best answered by referring briefly to the circumstances surrounding each of these investigations by the House.

In appointing its five-man committee to investigate the conduct of Robert Morris as Superintendent of Finance, the House rejected a Senate resolution empowering President Washington to appoint three commissioners to conduct such an inquiry. The Senate's resolution authorizing an inquiry under the control of the Executive was another expression of that body's faith in the executive branch. On the other hand, the substitution by the House of a legislative committee can be interpreted as an insistence by the lower Chamber on maintaining the powers and prerogatives of the legislative branch.[38]

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[37] See ch. xii, *supra*.

[38] *Annals*, 1st Cong., 2d sess., Feb. 8, 1790, p. 1168; Feb. 11, 1790, p. 1233; Mar. 9, 1790, p. 1466; Mar. 19, 1790, pp. 1514–1516.

In 1792, the chief impetus for an investigation of the St. Clair defeat came from critics of the administration; therefore this inquiry can, in a sense, be considered an expression of the stronger spirit of independence which characterized the lower House at this time. However, the issues were not sufficiently refined to present a simple House versus Executive alinement. It is probably safe to assume that the Senate took no steps to initiate such an inquiry because of the topheavy support the administration enjoyed in that body. On the other hand, the lower Chamber was also influenced by the belief that part of St. Clair's difficulties were due to improper use of public funds by contractors furnishing supplies and equipment to his forces, and—as Representative Hugh Williamson expressed it—"an inquiry into the expenditure of all public money was the indispensable duty of this House."[39]

The 1795 investigation of bribery charges against Randall and Whitney, involving a huge western land grant, was obviously a task for the lower Chamber since these men had been accused of offering bribes to certain Members of the House.[40]

The 1797 inquiry into the activities of William Blount was also clearly a task for the lower Chamber, this time under its constitutional impeachment power.

The impeaching power was the most prominently mentioned legal basis for the 1800–1801 House investigation of the administration of Winthrop Sargent as Governor of Mississippi Territory. However, here again the impetus for the investigation came from critics of the administration, who were more numerous in the House than in the Senate. The investigation was not demanded solely by the Republicans, however, since stanch Federalists like Robert G. Harper favored a formal inquiry in order to give Sargent opportunity to defend himself against charges accepted as true among House Members.[41]

When Oliver Wolcott resigned as Secretary of the Treasury, he appealed to the House for an investigation of his administration of the Department in order to clear his name of certain calumnies directed against him by the Republican press. Three reasons may have impelled him to seek such an investigation and the expected vindication at the hands of the House rather than the Senate. In the first place, the House considered itself the special guardian of the public purse and of the Department which held it. Second, since proceedings of the House generally received more publicity than those of the Senate, Wolcott—very sure of his own rectitude and confident of the result of an investigation—probably believed that vindication by a House committee would receive a wider circulation. Third, since the Senate, over the years, had been so closely identified with the Federalist Party and the administration, vindication by that body might give the appearance of a mere "whitewash." The House at the moment had a small Federalist majority, but traditionally had shown greater independence and a closer Federalist-Republican balance. The result of the investigation was that Wolcott received the vindication he sought—and by a committee which included several prominent Republicans.[42]

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[39] *Ibid.*, 2d Cong., 1st sess., Mar. 27, 1792, pp. 490–494. See also Marshall Edward Dimock, *Congressional Investigating Committees* ("Johns Hopkins University Studies in Historical and Political Science," series XLVII [Baltimore: Johns Hopkins University Press, 1929]), p. 88.

[40] *Annals*, 4th Cong., 1st sess., Dec. 28, 1795, to Jan. 7, 1796, pp. 166–229. See also Ernest J. Eberling, *Congressional Investigations* ("Columbia University Studies in History, Economics and Public Law," vol. CCCVII [Columbia University Press, 1928]), pp. 37–41.

[41] *Annals*, 6th Cong., 2d sess., Dec. 22, 1800, pp. 848–853.

The final investigation of the period was the inquiry into the mysterious fires in the Treasury and War Department buildings. It is probable that reasons such as those suggested in connection with the previous investigation applied here also. The impetus for the inquiry came from the Federalists, led by Robert G. Harper, who wanted a public vindication of their fellow Federalists in the executive branch. Here again such vindication was obtained through an investigation by a bipartisan House committee.[43]

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[42] *Annals*, 6th Cong., 2d sess., Nov. 25, 1800, pp. 787–789; letter, Wolcott to Hamilton, Sept. 3, 1800, Gibbs, *op. cit.*, II, 418; letter, Wolcott to Speaker of House of Representatives, Nov. 22, 1800, *ibid.*, II, 451.

[43] *Annals*, 6th Cong., 2d sess., Feb. 10, 1801, pp. 1020–1021; Gibbs, *op. cit.*, II, 478–483.

CHAPTER XIV

ENDING THE "CLOSED-DOOR POLICY"

THE "CLOSED-DOOR POLICY"

Illustrating more graphically than any other one event the Senate's adjustment to its permanent role as the first of two equal branches of Congress was its decision in 1794 to reverse its original policy and open its sessions to the public.

When the first Senators gathered in New York for their first session, they seemed to take it for granted that they would meet behind closed doors. In this they merely followed the practice of their predecessors, the delegates to the Congress of the Confederation, who also represented States as political entities and whose rules the Senators so largely adopted as their own. Moreover, closed sessions were a natural mode of procedure for a group not exceeding a present-day committee in number and boasting high conceptions of its own dignity. Continuance of the existing practice seems to have been the expectation long before the Senate first met, since the city of New York, in remodeling its city hall for the use of Congress, furnished a visitors' gallery for the House but none for the Senate.

The rules of the First Continental Congress in 1774 enjoined Members "under the strongest obligations of honour, to keep the proceedings secret until the majority shall direct them to be made public."[1] Such a rule was, of course, a bitter necessity to patriots who laid themselves open to charges of treason against the mother country. As time went on, less and less of the proceedings remained actually secret in the sense of a prohibition against the delegates divulging their transactions to the public.[2] However, the "old" Congress refused to admit the public to its sessions. In 1783, James Wilson, the Pennsylvanian who was to become the outstanding proponent of democracy at the Constitutional Convention, moved that the doors of Congress be open unless otherwise ordered, basing his argument on the premise that "it is important in every free country, that the conduct and sentiments of those to whom the direction of public affairs be committed, should be publicly known." Surprisingly enough, Wilson's motion was seconded by none other than Alexander Hamilton. These two obtained the support of only a handful of their colleagues, however, and the motion was defeated seven States to one (an individual vote of 19 to 5).[3]

The first standing rules adopted by the Senate said nothing about either secrecy or shut or open doors. Apparently, perpetuation of the practice of the "old" Congress was taken for granted by the Senators, whose duties were more analogous to those of the delegates to the previous Congress than were those of House Members.

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[1] *Journals of Continental Congress,* Sept. 6, 1774, I, 25–26.

[2] Comments of Abraham Baldwin in House of Representatives, *Annals,* 4th Cong., 1st sess., Mar. 14, 1796, p. 534.

[3] *Journals of Continental Congress,* Apr. 30, 1783, XXIV, 313–315. In 1779 the doors of Congress were opened during an audience for the French Ambassador, admission being by ticket. See *ibid.,* Nov. 13, 1779, XV, 1267.

It should be emphasized, however, that deliberations behind closed doors did not mean that the Senate's proceedings were entirely hidden from the public. In fact, the Constitution itself made provision for at least partial publicity, requiring each House to keep a journal of its proceedings and to publish it "from time to time," excepting such parts as might require secrecy. Moreover, the journal was to show the votes of all Members when desired by one-fifth of those present. In October 1789, the *Gazette of the United States* began publishing the *Senate Journal* for the session which had recently closed. In 1792 the Senate adopted a resolution directing its Secretary to furnish the printer of a public newspaper at least once a week a copy of the *Journal* for legislative sessions.[4] Thereafter, newspapers in the Capital occasionally published the Senate proceedings as reported therein. However, being mere skeleton outlines of Senate action, these reports gave hardly a hint of the legislative struggle within the Senate.

Senators often freely discussed outside the Senate Chamber the activities within. In fact, some Senators—notably the Virginians—believed it was their constitutional duty to keep their State governments informed about their activities in the Senate. House Members often had detailed information about developments in the upper Chamber—Maclay certainly showed no reticence in his discussions of Senate affairs with House Members from Pennsylvania. When the Senate wanted some aspect of its proceedings to remain secret, a resolution to that effect would be adopted, a practice previously followed by the Congress of the Confederation.[5]

On the other hand, meetings that were closed but not secret meant that the public's knowledge of what transpired behind the Senate's doors was apt to be incomplete and often garbled. Reading the *Senate Journal* after Congress had adjourned *sine die* was no substitute for day-by-day intelligence about what was said as well as what was done behind the Senate doors. Critics broadly hinted that the *Journal* was tampered with to suit the wishes of the Senate majority.[6] The *Journal*, even if accurate, showed yea-and-nay votes when one-fifth of the Members demanded, but showed none of the debates and thus left the public in the dark as to *why* a Senator voted as he did.

Human nature being what it is, the private character of Senate sessions caused the suspicious to regard the Senate as a dark and mysterious place where clandestine cabals were hatched against the public interest—in marked contrast to the House of Representatives, where all was open and aboveboard. Others, reading the House debates each day in the public press and failing to notice any record of Senate activities, tended unconsciously to regard "House of Representatives" and "Congress" as virtually synonymous terms, ignoring the Senate almost entirely. House Members, whose speeches were often carefully prepared with an eye to how they would appear on newsprint, received a lion's share of the publicity and became, in the public mind, the real legislative leaders of the new Government.[7] A rather widespread attitude toward the Senate was expressed in an address quoted in a Carlisle, Pa., paper:

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[4] *Senate Journal*, 2d Cong., 1st sess., Mar. 8, 1792, p. 150.

[5] For an example, see *Senate Journal*, 3d Cong., 1st sess., Mar. 26, 1794, p. 95; see also *Journal of Continental Congress*, Dec. 23, 1782, XXIII, 829.

[6] *National Gazette*, Feb. 16, 1793; *Annals*, 2d Cong., 2d sess., Jan. 8, 1793, pp. 625–626.

> It matters little to the public who presides in the Senate: They do not choose to let the public know any thing about the reasons of their political conduct; the public may therefore trouble themselves little about them, except it be to watch them with a jealousy and try to get rid of them as soon as possible; it is but little good ever they did, and but little good they can do, but they may do much evil; there are however valuable characters shut up in their Divan. We sincerely wish them released.—Pennsylvania wanted a Senator last session; we pray a greater evil may never befall her.[8]

THE PUBLIC OBJECTS TO THE POLICY

Regardless of how the Senators themselves felt about the practice of keeping their doors closed during legislative sessions, a large segment of the public denounced the policy from the very beginning. In fact, even before the inauguration of the new Government, the New York ratifying convention proposed a constitutional amendment providing that "both Houses shall always keep their doors open during their sessions, unless the business may, in their opinion, require secrecy."[9]

When the House in 1789 decided to open its sessions to the public, including press reporters, the Senate's contrary policy was the subject of much unfavorable comment. Joseph Jones, a Virginian of moderate political opinions, wanted to know why the Senate doors were shut when those of the House were open; he believed it was just as proper for the public to know about Senate proceedings as those of the House. If the Senate's debates had been public he was sure that that body's pretensions in the matter of titles and modes of communication between the two Houses would have been less lofty.[10]

Such rumblings reached President Washington, whose attitude toward the Senate's policy was rather cool:

> Why they keep their doors shut, when acting in a Legislative capacity, I am unable to inform you; unless it is because they think there is too much speaking to the Gallery in the other House, and business thereby retarded.[11]

Some of the opposition to the Senate's closed-door policy was based, at least ostensibly, on abstract republican principle—on the doctrine that in a republic the people have the right to know how their servants are discharging their trust. If, like the idolaters who erected an altar "to an unknown God," a people are content ignorantly to obey, they are slaves.[12] Arguing in this vein, a correspondent who called himself "Condorcet" wrote in the *National Gazette:*

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[7] The House carried the public nature of its sessions to such an extreme that visiting gentlemen were introduced by the Members to their colleagues and given seats on the House floor—outside the bar but within the area allotted for the use of the House. One Member complained that the crowd was often so great that Members could scarcely walk to the front of the Chamber to present papers to the Chair, and frequently there was no room left for Members who wished to confer privately with one another. See *Annals,* 3d Cong., 2d sess., Jan. 27, 1795, p. 1146.

[8] Quoted in *Gazette of the United States,* Sept. 26, 1792.

[9] *Elliott's Debates,* I, 330.

[10] Letters, Joseph Jones to Madison, May 28, 1789, and July 3, 1789, cited in *Massachusetts Historical Society Proceedings* XV (June 1901), 129, 132. See also Charles Warren, "Why Jefferson Abandoned the Presidential Speech to Congress," in the same publication, vol. LVII (November 1923), 142–143 fn.

[11] Letter, Washington to David Stuart, July 26, 1789, Fitzpatrick, *Writings of Washington,* XXX, 363.

> **It augers an unfriendly disposition in a public body that wishes to *masque* its transactions—Upright intentions, and upright conduct are not afraid or ashamed of publicity. The spirit of a *Venetian senate* suits not, as yet, the meridian of the United States; neither does the conduct of a *conclave* or a *divan* comport with the feelings of Americans.[13]**

More often, however, opposition to the privacy of the Senate's sessions was based less on abstract principle than on its alleged connection with a host of political measures which the critics disliked. The closed-door policy, said they, was part and parcel of an ominous movement to establish aristocracy in America— a movement that included adding royal trappings to the Presidency and enhancing the "noble" Senate at the expense of the House. In 1792, true republicans participating in a "military exhibition" in Vermont drank a toast to the hope that—

> *** * * the American states be long defended from the inundation which is threatened by the increase of aristocrats, who wish for a rich metropolis and a poor peasantry; want a great personage's head on the current coin; and are advocates for keeping shut the doors of the Senate.[14]**

Avowed friends of the French Revolution identified the open House sessions with the institutions of the great new Republic across the sea, and the closed Senate sessions with the unpopular features of the British Government, especially the House of Lords. Wrote "Mirabeau":

> **The PEERS of America disdain to be seen by vulgar eyes: the music of their voices is harmony only for themselves, and must not vibrate in the ravished ears of an ungraceful and uncourtly multitude * * *. The Senate * * * usurp the *secret privileges* of the House of Lords * * *.[15]**

It was considered very significant that the Bank of the United States—the "monster" designed further to enrich the rich and impoverish the poor—was hatched, not in the open and honest House of Representatives, but "in the close and mysterious House of Senators." [16] For years afterward, enemies of the Hamiltonian system spoke of the "lurking hole" where the bank was born.

For the sake of maintaining the proper perspective, perhaps it should be pointed out here that the Senate's closed doors were considered merely the most flagrant example of an allegedly general tendency to keep the operation of the Government hidden from the eyes of the public. Other examples included "secret" operations of executive departments, especially the Treasury, and what were considered all-too-frequent closed sessions of the House of Representatives.[17]

KNOCKING ON THE SENATE'S DOORS

An effort to force open the Senate doors began shortly after inauguration of the new Government—long before opposition to the

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[12] *National Gazette,* Aug. 8, 1792, quoting the *Universal Asylum; ibid.,* Nov. 21, 1792, quoting the *Aurora.*

[13] *Ibid., Dec.* 15, 1792. Italics are in original.

[14] *Ibid.,* July 7, 1792.

[15] *National Gazette,* Feb. 13, 1793.

[16] *Gazette of the United States,* May 11, 1791.

[17] The House occasionally considered it desirable to close the galleries during discussion of confidential business or as a result of disturbances in the galleries.

Hamilton program coalesced into a party, but motivated by much the same philosophy that inspired the Republican Party in later years. It was no accident that much of the impetus came from Virginia, home of so many of the Republican leaders.

Some time after April 29, 1790, a resolution of the Virginia Assembly demanding open doors was placed in the hands of the Virginia Senators. Thereafter, year after year, the assembly instructed the Senators from that State to use their utmost endeavors to open the Senate's legislative sessions to the public.[18] Cheerfully complying with such instructions, the Virginia Senators time after time submitted motions in the Senate calling for open doors. Carrying the campaign further, the Virgina Assembly wrote the other States encouraging their legislatures to instruct or request their Senators to work for open doors. Either as a result of Virginia's prompting, or acting independently, many of the State legislatures emulated the Old Dominion's example. By 1792, according to Lee and Monroe (who may have exaggerated), more than one-half of the legislatures had expressed themselves in favor of open Senate sessions.[19] In the meantime, Freneau's *National Gazette* began to hammer hard at the closed-door policy.

Resolutions introduced in the Pennsylvania Senate and the Maryland House of Delegates, stating boldly the arguments for open doors, were published in that *Gazette* for all the Senators to read. These resolutions carefully avoided implying that there was any connection between the campaign to open the Senate doors and the doctrine that Senators were agents of the State legislatures and subject to their instructions. In fact, the proponents of these resolutions did not even avail themselves of this opportunity to "instruct" their Senators to work for open sessions. The Maryland resolution merely stated that open doors were essential to public confidence in the Senate, while the Pennsylvania resolve assured the Senators from that State that any exertions they might make to comply with the principles therein would be regarded as an important public service.[20]

However, the Legislatures of Virginia and North Carolina—where State particularism was far stronger—saw a close connection between the doctrine that U.S. Senators were the agents of the legislatures and the desirability of opening the Senate's doors. How could the legislatures control the activities of the Senators they elected if their knowledge of the Senators' conduct in Congress was limited to the sketchy outlines in the *Senate Journal*?

There was remarkably little *public* defense of the closed-door policy even by those who might have been expected to defend the upper Chamber and its Federalist majority. Fenno's *Gazette of the United States*, for example, admitted that it was "the general wish of the legislatures of the several states" that the debates of the Senate should be public.[21] A correspondent whom Fenno quoted with evident approval suggested that the Senate open its doors for at least one session on a trial basis to dispel from the public's mind the monstrous fantasies spun by the Senate's critics:

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[18] Beveridge, *op. cit.*, II, 57, citing Virginia House of Delegates *Journal*, Oct. 25, 1791, and Nov. 8, 1793; *Gazette of the United States*, Feb. 15, 1792; letter, Richard Henry Lee and James Monroe to Gov. Henry Lee, Feb. 14, 1792, *Calendar of Virginia State Papers*, V, 443; Maclay, *op. cit.*, pp. 251, 399.

Supporters of George Clinton's 1792 vice presidential hopes took pains to equate support of their candidate with the campaign against the Senate closed-door policy.

[19] Letter, Lee and Monroe to Governor of Virginia, May 9, 1792, *Massachusetts Historical Society Proceedings* XLII (May 1909), 321.

[20] *National Gazette*, Feb. 16 and Mar. 5, 1792.

[21] *Gazette of the United States*, Jan. 22, 1791.

> It is said there are some fine speakers in that branch of the Legislature; they would be very popular—the only objection is, that they would become too much so—They would then exhibit in their proper persons—but at present they are only known by *Caricatures*—and fancy can draw very queer figures—
>
> From the dark conclave, close confin'd,
> Hydras and gorgons haunt the mind;
> To clear away all fear and doubt,
> They ought to "let the darkness out!"
> Bright rays will then dart from below,
> As all *their* rapid movements show.[22]

It is apparent that this point of view became increasingly common among the Senate's Federalist supporters, who were becoming more and more irritable under the constant barrage of criticism directed against that body. Why not open the Senate doors and show the country that the "aristocracy" which had been the object of so much anti-Senate invective was merely an "aristocracy of information and abilities" rather than a threat to republicanism?[23] Federalists also began to realize that closed Senate sessions withheld from the public the effective defense of the Federalist program contained in the arguments of their party's able cohorts in the upper Chamber. Public sessions and publication of Senate debates might prove valuable antidotes for the "heresies" preached by House Republicans and widely disseminated by the press. This became an important consideration especially when the Republicans, in the Third Congress, captured control of the lower Chamber.[24]

ARGUMENTS FOR THE DEFENSE

In view of such potent arguments from friend and foe, it may seem strange that the Senate maintained the closed-door policy as long as it did. However, the proponents of that policy had some telling arguments of their own.

The most commonly expressed argument against public sessions was the claim that they promoted oratorical flights to please the gallery or the public press and thus interfered with expeditious and efficient performance of public business. It is quite apparent from the *Annals* that this argument had considerable validity. Visitors in the gallery—by clapping, striking their canes on the floor, or crying "Bravo!"—even interfered with the conduct of business in the Chamber below.[25]

Answering the argument that open doors would result in a healthy nationwide dissemination of the debates through the press, defenders of the closed-door policy claimed that the newspaper reports of House debates were notoriously inaccurate. Since no official shorthand reporters were employed, the public was dependent on two or three reporters—sometimes only one—employed by the newspapers, whose transcripts of the debates were inaccurate, incomplete, and often distorted by political bias. Sometimes speeches were omitted entirely.[26] These accounts of the debates were copied from paper to paper—a sorry compliment to the lower House for keeping its doors open.[27]

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[22] *Ibid.*, Dec. 21, 1791. "Below" apparently refers to the House of Representatives, which met on the floor below. Its lack of "rapid movement" due to much speechifying is here twitted.

[23] Correspondent in *Aurora*, Mar. 6, 1794.

[24] *Columbia Centinel*, Nov. 5, 1795.

[25] *Gazette of the United States*, Mar. 17, 1792; *Aurora*, Mar. 18, 1794, Mar. 25, 1794, Mar. 26, 1794.

While Senators could not parade their eloquence, neither did they have to bare their foibles to the country at large. Senator Paine Wingate elaborated on this argument in a letter obviously not meant for the eyes of the multitude:

> I think to be a little more out of view would conduce to its respectability in the opinion of the country, who would then judge of that body by its public acts and doings, which should be sent abroad, as immediately concerning them. You know I am not a friend to mystery and hypocricy, but there are certain foibles which are inseparable from men and bodies of men and perhaps considerable faults which had better be concealed from observation. How would all the little domestic transactions of even the best regulated family appear if exposed to the world; and may this not apply to a larger body?[28]

Undoubtedly the closed-door policy protected individual Senators from pointed criticism. No matter how unpopular the viewpoints of the more conservative Federalist Senators may have been, it was Federalist Members of the lower House like William Smith and Fisher Ames who, by their speeches before the House, invited the sharpest barbs of the *Aurora*, the *National Gazette*, and the Democratic Societies.

There was a correlation between the closed-door policy and the Federalist doctrine that the Government ought to be clothed in a robe of dignified aloofness, ultimately responsible to the people but not under their close and immediate scrutiny. However, the issue was not clear-cut, since strong Federalists like Senators Rufus King and Philip Schuyler consistently supported open sessions.

Justice James Iredell of the U.S. Supreme Court confessed that he personally had not seen the "slightest color of a reason" for the policy until he heard the following reasons—perhaps from his brother-in-law, Senator Samuel Johnston, of North Carolina:

(1) Few men could resist making oratorical speeches to display their eloquence. This would increase the expense of congressional sessions. (2) The gallery, consisting chiefly of Philadelphians, would unduly influence the Members. "What may appear improper to Pennsylvania may be in fact highly pleasing to North Carolina." (3) It would be futile to try to prevent improper measures by adopting an open-door policy, since the Senators could still close the doors on the pretext of considering confidential business and then, in secret, adopt a "tremendous scheme to betray their country." (4) No government on earth could exist without some matters being held in confidence. The North Carolina government itself had recently admitted this.[29]

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[26] McPherson, *op. cit.*, pp. 10–20. According to this dissertation, Government-sponsored reporting of debates was prevented by newspaper opposition.

[27] *National Gazette*, Mar. 26, 1792.

[28] Letter, Wingate to Timothy Pickering, Apr. 29, 1789, Wingate, *op. cit.*, II, 302.

Maclay used similar characteristics as an argument in favor of open doors. "I am confident some gentlemen would have been ashamed to have seen their speeches of this day reflected in the newspapers of tomorrow." See Maclay, *op. cit.*, p. 371.

[29] Letter, Iredell to John Hay, Apr. 14, 1791, McRee, *op. cit.* II, 327–328.

THE DOORS SWING AJAR

As previously mentioned, the first attempt to reverse the closed-door rule was made in April 1790. That effort was not only defeated without a record vote, but received so little consideration that even Maclay, who favored it, considered the event of so little importance that he failed to record it in his journal.

In February 1791 Senators Richard Henry Lee and James Monroe brought the subject before the Senate again. Their proposal precipitated a lively discussion involving both the desirability of opening the Senate doors and the right of State legislatures to instruct. The proponents' arguments, however, seemed to have little effect since the Lee-Monroe motions were defeated 17 to 9. This vote wore a party aspect only to the extent that almost all the "nay" votes were cast by Senators of Federalist orientation. The "yea" votes were about equally divided between proponents and opponents of the Federalist program.[30]

Similar efforts in 1792 and 1793 were defeated by 17-to-8 and 18-to-10 votes, respectively.[31]

Confirmed four times by consistently large majorities, the Senate closed-door policy was considered by almost all observers—even its bitter opponents—as likely to remain a feature of the Senate for years to come. Yet in 1794, only a year after a defeat by an almost 2-to-1 majority, the Senate demonstrated one of the strange reversals which sometimes occur in legislative bodies, and adopted an open-door motion by an even larger majority. This reversal requires some explanation.

With the opening of the Third Congress, Alexander Martin replaced the assembly-defying Samuel Johnston as Senator from North Carolina. Martin was somewhat of a chameleon in Tarheel State politics. Chosen a delegate to the Constitutional Convention in 1787 as a states' rights man, he had subsequently incurred the enmity of his former supporters by urging adoption of the Constitution. Elected Governor by the Federalists in recognition of his services, he somehow regained the confidence of the anti-Federalist element, which in turn elected him Senator in 1792.[32]

Almost immediately after his arrival in Philadelphia, Martin presented to the Senate a hard-hitting resolution calling for open Senate doors in order to make the upper Chamber more responsive to the State legislatures, and, through them, to the people.[33]

Martin apparently offered his resolution in an effort to consolidate his standing in the states'-rights-conscious North Carolina Legislature and among the radicals in the State at large. However, an irreverent House Member from his own State had other ideas. Referring to the apocryphal story that Martin had hidden in a hollow log at the Battle of Germantown in 1777, the waggish William Barry Grove implied that the Senator's action was caused by claustrophobia:

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[30] *Annals*, 1st Cong., 3d sess., Feb. 25, 1791, p. 1811; Maclay, *op. cit.*, pp. 399–401, entries for Feb. 24 and 25, 1791.

[31] *Annals*, 2d Cong., 1st sess., Mar. 26, 1792, p. 113; 2d Cong., 2d sess., Jan. 3, 1793, pp. 625–626, and Feb. 4, 1793, pp. 637–638.

[32] Wagstaff, *State Rights and Political Parties in North Carolina*, p. 17.

[33] *Annals*, 3d Cong., 1st sess., Jan. 16, 1794, pp. 33–34.

> It is indeed a very unpleasant thing to be confined in a close room or indeed in a ho-l-lw-L-g in a warm day.[34]

Whatever the motives of its sponsor, the resolution evidently made no immediate stir in the Senate. Its consideration was postponed for 2 weeks, then for another fortnight. Due to the absence from the Capital of three Senators expected to vote in favor of open doors, supporters of the move were far from hopeful.

In the meantime, the proponents of public sessions saw in the controversy involving Albert Gallatin's eligibility for a Senate seat an opportunity to make a small breach in the closed-door policy. On February 10 they presented a motion providing that the Senate's doors remain open during the floor discussion of Gallatin's eligibility. Such a measure would obviously be of little practical value to the general run of prospective visitors since the Senate Chamber had no gallery to accommodate them. However, the closed-door policy on this occasion placed the Senate in a delicate situation. The action of the Pennsylvania Legislature in choosing a U.S. Senator was under investigation. Furthermore, the American people were peculiarly sensitive to even the appearance of "star chamber" proceedings affecting the rights of an indivdual. The Senate's Federalist majority would be placed in an exceedingly embarrassing position if it were to deny Gallatin a seat after hearings hidden from the public. The result was that the motion to open the doors during that discussion was adopted the following day, without a record vote.[35]

In spite of the absence of a gallery, some visitors did attend this debate. One of them—a firm believer in Gallatin's eligibility—reported that he was—

> pleased with the abilities exhibited in each side, and the Senate need not be apprehensive of losing reputation, by keeping open doors on any question.[36]

On February 19, the second 2-week postponement of Martin's resolution for permanent reversal of the closed-door policy had expired and the Senate again came face to face with that issue. First, the preliminary resolution containing Martin's arguments for open doors was defeated out of hand. Then a motion to postpone the main question—the simple issue of open doors—until the following session was offered and, as expected, was passed. However, by now the changing sentiment of the Senate was evident—instead of the 2-to-1 majority of previous years, this time open doors were defeated by the closest vote possible, 14 to 13.

At this juncture the affable and urbane Senator Stephen R. Bradley of Vermont saw that the fate of the closed-door policy was in his hands. He had twice voted to continue the policy, but as an independent-minded Yankee he apparently had no deep convictions on the subject one way or the other. He now recognized that by the reversal of his vote the open-door forces would have enough support to achieve their object. He consequently moved that the decision to postpone be reconsidered.[37] Seeing that Bradley's vote would give the backers of open doors the victory, three other New Englanders—Foster of Rhode Island and Langdon and Livermore of New Hampshire—jumped on the bandwagon. The motion to reconsider thus passed by a 17-to-10 vote. The Senate now quickly amended the pending motion to read:

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[34] Letter, Grove to John Steele, Apr. 2, 1794, Henry McGilbert Wagstaff (ed.), *John Steele Papers* ("Publications of the North Carolina Historical Commission," [Raleigh: Edwards & Broughton Printing Co., 1924]), I, 109.

[35] *Senate Journal*, 3d Cong., 1st sess., Feb. 11, 1794, p. 49.

[36] *Aurora*, Mar. 8, 1794.

> *Resolved*, That, after the end of the present session of Congress, and, so soon as suitable galleries shall be provided for the Senate Chamber, the said galleries shall be permitted to be opened every morning, so long as the Senate shall be engaged in their legislative capacity, unless in such cases as may in the opinion of the Senate require secrecy, after which the said galleries shall be closed.[38]

On the final vote to adopt this motion, Vining of Delaware and even the highly influential Oliver Ellsworth also moved over to the open-door side, giving that side a lopsided 19-to-8 victory—in sharp contrast to four crushing defeats in as many years.[39]

The debate on the question was bitter and acrimonious. John Adams, after listening to some of his best friends being berated by the more headstrong open-door advocates, commented:

> What the effect of this measure, which was at last carried by a great majority, will be, I know not: but it cannot produce greater evils than the contest about it, which was made an engine to render unpopular some of the ablest and most independent members.[40]

Commenting on the vote, the hypercritical *Aurora* stated that the mystery of the Senate's sudden reversal could only be explained by supposing that certain Senators, seeing the measure was about to carry, chose to appear on the popular side.[41]

This, however, was only a partial answer; it did not explain why the 18-to-10 vote against open doors in 1793 had dwindled to a mere 14-to-13 majority in the 1794 postponement vote. That significant narrowing of the margin must be explained by a comparison of the two votes.

Such a comparison reveals that all 10 Senators who favored public sessions in 1793 were back to support the Martin resolution the following year. The open-door forces picked up three additional votes from freshman Senators. One of these filled a 1793 vacancy, one replaced a 1793 absentee, while the third replaced an opponent of open doors. The opponents of open doors, on the other hand, lost a net of one vote through failure to achieve reelection, one through resignation, and two through temporary absence from the Senate.[42]

This comparison hardly justifies the simple conclusion that the Senate was forced to open its doors by a great ground swell of pressure from the public working on the State legislature's choice of Senators. Such pressure could have been a factor in bringing about a gain of three votes for the open-door cause. However, if the two closed-door advocates who were absent in 1794 had been present, Bradley would not have had his opportunity to bring about the reversal by changing his vote, and the open-door resolution would have been defeated again.

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[37] Letter, Monroe to Jefferson, Mar. 3, 1794, Stanislaus Murray Hamilton (ed.), *Writings of James Monroe* (New York: G. P. Putnam's Sons, 1898–1903), I, 284.

[38] *Annals*, 3d Cong., 1st sess., Feb. 19, 1794, p. 46.

[39] *Ibid.*, Feb. 20, 1794, p. 47.

[40] Letter, Adams to his wife, Feb. 23, 1794, Adams *Works*, I. 467.

[41] *Aurora*, Feb. 24, 1794.

[42] The reasons for these absences are not recorded. Henry of Maryland did not report for the session until April 9; Robinson of Vermont had been consistently present up to and including the last preceding record vote on January 24.

At any rate, this was a famous day in the history of the Senate. The decision to open the doors did not, of course, mean that the Senate's majority accepted all the arguments of its critics. Neither did it immediately bring the Senate into great public favor—the Jay Treaty ordeal was still to be faced and many another critic's sneer would have to be endured. But the decision did, at least, remove one chafing irritant which tended to alienate the Senate from the public, and did remove some of the sting from the critics' claim that the Senate was a nest of secret plotters against the welfare of the plain people of the Nation.

Although the Virginia Senators had been, over the years, the most conspicuous champions of public sessions, the greatest acclaim for the final success of the campaign went to Alexander Martin, the freshman Senator from North Carolina, who "gained no small credit for his perseverance and success in his motion."[43] The popularity won by this victory was not enough, however, to save him from the wrath of his fellow Republicans when he a few years later voted for the hated Alien and Sedition Acts.

Downstairs in the House Chamber, the Members greeted the decision of their brethren upstairs with great good humor:

> Now Mr. G[rove] be so good as to step upstairs and take a peep into the Senate chamber—That mighty conclave where it has been surmised Majestic Majack dwealt, where the illumed minds of mortals shone so bright as to exclude the rays of light from Heaven—where it has been suggested that Dangerous Vice sits as a minion on a throne, to make the hateful monster *aristocracy* lose all its proud and surley Features by dressing it in the garb of Davilla, the Deception however is discovered, and the Lords, the mighty Lords, are to be beheld as soon as accommodations can be prepared for the People, who in their compassion must behold some of them with *Pity* because they may expose their weakness in an unguarded hour—to be short with you the Doors of the Senate are to be opened next session—when some of these within will show their *nakedness* * * *.[44]

In spite of the perturbation attending the decision to make the Senate's sessions public, it was almost 2 years before the galleries were completed and the permanent open-door rule actually put into effect. The building temporarily used as Congress Hall was actually a county court building, apparently maintained by appropriations of the Pennsylvania Legislature. Funds to cover the cost of constructing the Senate Gallery were delayed.[45] The 1794 recess, 5 months long, went by without a hammer being heard. The entire second session of the Third Congress was thus closed to the public. It was not until the autumn of 1795 that construction was underway. When the first session of the Fourth Congress opened, the newspapers could finally announce that Senate sessions were open to the public.[46]

In the meantime, the Senate had considered and approved the Jay Treaty during the special June session of 1795. Early in that session, the Senators adopted a resolution invoking strict secrecy, to remain in effect until further order of the Senate.[47] This was going a step further than the merely nonpublic nature of the regular legislative sessions, but was in line with established precedents covering executive business. The resolutions introduced by the Virginia Senators and the demands from all over the country for public Senate sessions had invariably excepted executive sessions. The open-door resolution adopted the previous year but not yet in effect had excepted both executive and judicial sessions.

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[43] Letter, William Barry Grove to John Steele, Apr. 2, 1794, Wagstaff, *John Steele Papers*, I, 109.

[44] *Ibid.*, pp. 108–109.

[45] *Aurora*, Feb. 28, 1795.

[46] *Ibid.*, Nov. 5 and 17, 1795, Dec. 11, 1795.

[47] *Senate Executive Journal*, June 8, 1795, p. 178.

Nevertheless, the outcry against the Senate for considering so critical an issue as the Jay Treaty in secret was extremely vociferous and bitter. Secrecy is opposed to honesty—corruption hides behind it. When Republican France concluded a treaty with Prussia, it debated and ratified the document in open sessions in the presence of the people. Secrecy implied superiority:

> Thus it is with the Senate. They undertake to deliberate and decide upon what is best for the people, and what shall govern them, without giving them an opportunity of exercising an opinion upon a subject of the most supreme importance to them.[48]

On the last day of the special session, the Senate revoked the order of secrecy but prohibited Senators from presenting a copy of the treaty to any outsider. The extravagant praise accorded Senator Stevens T. Mason for his "patriotism" in violating this prohibition was a further means of protesting the secrecy of the Senate session.

This whole agitation over Senate secrecy during action on the Jay Treaty is, however, best understood as a protest, not so much against secrecy *per se*, but against the treaty under consideration. The Republicans were opposed to any treaty with Great Britain, and their feelings against the document negotiated by Jay were further inflamed by persistent rumors that it surrendered cherished rights of the United States. That the Senate should consider such a surrender to the "Federalists' patron nation" behind an injunction of secrecy was, of course, an intolerable situation in Republican eyes.

Opposition to the secrecy of Senate executive sessions continued to show itself during the remainder of the period under study.

RESULTS OF THE "OPEN-DOOR POLICY"

In view of the great importance attached to the question of public sessions by both proponents and opponents of that policy, it is natural to ask the question, "What practical change did the new policy bring?"

The immediate result was almost comically undramatic. There was absolutely no sustained rush of spectators to the newly constructed gallery; contemporary records contain extremely few references to visits to the Senate Chamber to listen to the debates. Apparently the Senate had too much dignity and decorum to compete successfully with the more ebullient eloquence downstairs. When the Senate first opened its doors, it included some of the most distinguished men in America—Oliver Ellsworth, George Cabot, John Langdon, Rufus King, Aaron Burr, William Bingham, Pierce Butler, Henry Tazewell, to name a few—but apparently the sight and sound of two dozen urbane gentlemen discussing in courteous, conversational tones the issues of the day did not have the appeal of the more boisterous and vehement partisanship displayed in the larger Chamber on the floor below.

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[48] *Aurora*, June 22, 1795. See also the issues of June 16 and 23, July 4, and Oct. 14, 1795.

Nor was the situation much different with respect to reporting and disseminating the Senate debates for the Nation to read. In order to understand why this was so, it is necessary to have in mind the conditions under which congressional debates were stenographically reported in this early day.

It must be emphasized, first of all, that during this period there were no official reporters of debates in either House. In fact, it was not until 1873 that reporting the debates became an official function of Congress. *The Debates and Proceedings in the Congress of the United States*, popularly known as the *Annals of Congress*, which cover the period from 1789 to 1824, are a composite by Joseph Gales, Jr., and William Winston Seaton of the reports of the debates by the privately sponsored *Lloyd's Register of Debates* and by reporters employed by various contemporary newspapers, combined with information from the *Journals* of the two Houses. During the period under study—long before Gales and Seaton themselves took over the reporting of debates—such newspaper reporting of the sessions was often inaccurate, distorted, and incomplete.

The House of Representatives frequently engaged in a running battle with the reporters, sometimes denying them admission to the floor and thus placing physical handicaps in the way of their reporting efforts. Yet, authentic, official reporting of the debates, although suggested at least as early as 1792, received very little support—because of lack of precedent on either side of the Atlantic, the influence of partisan politics, and the strong opposition of the press.[49] On the other hand, the newspaper reporters were generally tolerated on the House floor because the Members were unwilling to have their utterances entirely withheld from the press.

The conditions under which congressional debates were reported help explain why Senate debates, with very few exceptions, were not taken down stenographically or reported for the press for several years after the Senate opened its sessions to the public. The newspaper editors found that there was too little public interest in the Senate debates and that these lacked the partisan flavor they desired in the columns of their highly partisan papers. The editors often did not have the funds to employ reporters to take down the debates of both Senate and House, and given the choice of one or the other, they almost invariably sent their men to the lower House. Fenno's *Gazette of the United States* paid little attention to the Senate debates, although it published the House debates at length. Soon after the Senate opened its doors in December 1795, the *Aurora* began to publish its debates, but almost immediately discontinued the policy, thereafter ignoring the Senate proceedings unless the upper Chamber happened to be debating a subject of unusually high partisan interest.

Stenographic reporting of the Senate debates was also rather difficult, since the Senate made no provision for the reporters on the Senate floor. The reporters were forced to take their notes sitting in the gallery with the other visitors, which they found quite awkward—especially on the few occasions when the gallery was crowded, which were apt to be the very occasions when they desired to record the debates. When the Blount conspiracy case came before the Senate, a motion was introduced to provide stands for stenographers on the floor of the Senate, but this gesture of goodwill to the press was summarily rejected.[50]

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[49] McPherson, *op. cit.*, pp. 1, 11–24. See also *Annals*, 2d Cong., 1st sess., Apr. 20, 1792, p. 563.

Nevertheless, if the editors really desired stenographic reports of the Senate debates, it was possible to obtain them—this was proved by the *Aurora's* success in reporting the debates on such measures as the alien bill in 1798.[51] The Republican editors' failure, during the 5 years from the opening of the Senate's doors to the removal of the Capital to Washington, to take greater advantage of the Senate gallery, indicates that much of their agitation against closed sessions had been based less on a genuine desire to inform the public than on eagerness to make political capital out of a policy which lent itself to sarcasm and satire.[52]

The situation changed, however, when Congress moved to the new Capitol at Washington. Here the reporters found that the Senate gallery was so remote from the floor that it was impossible to hear the debates distinctly enough to take down the Senators' remarks accurately. Here, also, appeared an editor genuinely interested in reporting the upper Chamber's proceedings—not only sporadically, when they excited partisan feeling—but day by day. Samuel Harrison Smith, editor of the Philadelphia *Universal Gazetteer*, transferred his establishment to Washington and on October 31, 1800, issued the first number of his triweekly *National Intelligencer*, Republican in principle but more moderate in tone than the intensely partisan sheets of Freneau, Bache, and Duane. Finding that it was impossible accurately to report Senate debates from the Chamber's lofty gallery, he applied to the Senate in January, 1802, for admission to the Senate floor for the purpose of recording the debates. There he ran into strong opposition from the Federalists, some of whom may have been opposed in principle to stenographic reporting of the debates but most of whom were more probably antagonistic to Smith's request because of the editor's Republican orientation—an understandable attitude in view of the partisan use to which reporting of debates had been put for years. The Federalists no longer controlled the Senate, however, and Smith's request was approved 16 to 12. The resolution applied to "any stenographer, or note-taker, desirous to take the debates of the Senate on Legislative business."[53]

This decision, a logical expansion of the 1794 decision to open the Senate sessions to the public, marked the beginning of a new era in the history of the Senate. Smith, in announcing the approval of his request, proved to be a true prophet when he wrote:

> On the adoption of the above resolution, which opens a new door to public information, and which may be considered as the prelude to a more genuine sympathy between the Senate and the people of the United States, than may have heretofore subsisted, by rendering each better acquainted with the other, we congratulate, every friend to the true principles of our republican institutions.[54]

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[50] *Annals*, 5th Cong., 1st sess., July 7, 1797, p. 38.

[51] *Aurora*, June 13, 1798, showing debate of July 7, 1798.

[52] A further demonstration of the political nature of the furor over secrecy is given by Republican opposition to, and Federalist defense of, publication of the XYZ papers in 1798.

[53] *Annals*, 7th Cong., 1st sess., Jan. 5, 1802, p. 2.

[54] *National Intelligencer*, Jan. 8, 1802. Subsequently Joseph Gales, Jr., became the *National Intelligencer's* reporter in the Senate and his brother-in-law, William Seaton, in the House. In 1813 the paper became a daily. From 1802 on, the *Annals of Congress* are, for the most part, a combination of the congressional *Journals* and the procedings as reported in the *Intelligencer*. See McPherson, *op. cit.*, pp. 9–10, 29–31, 58–59.

The effect of open sessions and press reporting of debates on the quality of the Senate's work is difficult to evaluate. George H. Haynes believed that closed doors expedited business, pointing to Maclay's frequent comment that the Senators often finished their work so early that they could attend the debates of the House after their own sessions.[55] Private sessions also made it possible for Members to speak their minds more frankly and espouse unpopular but valid opinions, giving Senate debates a more genuine quality quite different from the "window-dressing" character of so many public debates.

However, the greater brevity of Senate sessions was not always due to the upper Chamber's greater efficiency. It should be noted that in these early days the Senate did not do as much of the spadework on legislation as did the House. The upper Chamber's executive duties were not time consuming enough to compensate for the greater labor involved in originating the greater part of the legislative business.

Furthermore, those who believe that one of the legitimate duties of Congress is that of "informing the nation" will hardly admit that even long and repetitious debates are a total waste. House discussions of such critical issues as the Hamilton financial program and the treatymaking power undoubtedly did much to educate the public as well as to furnish a safety valve to relieve the presure of opposition to the administration's program. A few decades later Senator Webster undoubtedly had the gallery in mind when he delivered his reply to Hayne, but few would admit that his oratorical efforts were therefore without value.

The practice of deciding vital public issues in a Chamber veiled from the general public had become, in the brief period under study, an anachronism. That was proved not only by the attacks of the Senate's critics, but even by the attitude of its friends. A hundred years later, the German Bundesrat, upper chamber of the Imperial Parliament—enjoying extensive constitutional powers and the support of the State governments, but deliberating in secret—found itself hard pressed by the Reichstag with its public debates and more active party strife. If the Senate had persisted in its closed-door policy, it, too, would no doubt have been overshadowed by the Chamber more in contact with the public will.

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[55] Haynes, *Senate of the United States*, I, 76; Maclay, *op. cit.*, *passim*.

CHAPTER XV

Leadership in the Senate, 1789–1801

The framers of the Constitution apparently believed that legislation in Congress would be self-propelled, for they concerned themselves little with the problem of driving power behind the legislative process. It is true that they provided the Senate with a President in the person of the Vice President of the United States and empowered the lower House to choose a Speaker, but it is evident that these officials were intended to be merely presiding officers—arbiters of the contending forces in their respective Chambers rather than the initiators of the legislative program and field marshals in the struggle to obtain its adoption.

The experience of the Senate during its formative years was an object lesson in the need for a "legislative impulse" and in the manner in which nonconstitutional forces filled gaps left by the constitutional fathers.

THE ROLE OF THE VICE PRESIDENT

The method of electing the Vice President provided by the Constitution before adoption of the 12th amendment assured the Senate of a presiding officer high in national prestige. However, from the very first, the fact that the Vice President was thrust upon the Senate from the outside handicapped him in exercising actual leadership in the body over whose sessions it was his duty to preside.[1] Yet, if John Adams had been a different type of individual, the Vice Presidency during these first 8 years might have been the source of the legislative leadership which the Constitution did not otherwise provide. In 1789, without previously having worked together as an organized group, the Senators naturally had less sense of group solidarity than they had later, and might thus have been less prejudiced against accepting leadership from someone not chosen by themselves. Moreover, in that year there were no party leaders to act as rivals.

An outstanding leader of the patriot cause during the Revolution, a serious student of government, a statesman with legislative experience, a wide background in foreign affairs (the peculiar concern of the Senate), and an integrity recognized everywhere—John Adams brought to his position as head of the upper Chamber talents of a high order. Facilitating accomplishment of his Vice Presidential duties was the fact that he had the confidence of President Washington and that he was in general agreement with the strong-government program so dear to the heart of the Senate's majority.

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[1] For a study of the Vice Presidency during these early years see Helen Ruth Rosenberg, "The Vice Presidency of the United States" (unpublished Ph. D. dissertation, Political Science Department, University of California, 1930).

Moreover, he took his Senate duties very seriously. On July 4, 1790, Abigail Adams could observe:

> Ever since the 4th of Janry he has not mist [sic] one hour from attendance at Congress. He goes from Home at ten and seldom gets back till four, and five hours constant sitting in a day for six months together (for he cannot leave his Chair) is pretty tight service. Reading long Bill [sic], hearing debates, and not always those the most consonant to his mind and opinions, putting questions, stating them, constant attention to them that in putting questions they may not be misled, is no easy task whatever Grumblers may think.[2]

Senator William Maclay, who was definitely one of the "grumblers" to whom Mrs. Adams referred, heartily disliked the Vice President and lost no opportunity to ridicule him in his diary and to impute to him the most contemptible motives. However, the Senators on the whole had a great deal of respect for their presiding officer. Senator George Read, of Delaware, who was not particularly close to the Vice President, wrote in 1792 that Adams as "chairman" of the Senate was "attentive, upright, fair, and unexceptionable, and his attendance at the daily meetings of the Senate uncommonly exact." [3] The same year even Jefferson referred to "the strength of his personal worth." [4]

When Adams was about to leave the Senate to assume the Presidency, the Senators bade him a very affectionate farewell. After beating back a motion to recommit by the ever-present "grumblers," his many friends adopted a farewell resolution that went beyond the call of courtesy in praising his "abilities and undeviating impartiality." [5]

Adams' service in the Vice President's chair is also remembered for the numerous times he was called upon to break Senate deadlocks with his vote. A number of these votes were on important issues, the most critical of which was Senate participation in Presidential removals of executive officers.

Yet, despite Adams' creditable performances as presiding officer of the Senate, he established a strong precedent against Vice Presidential leadership in pushing through a legislative program. He started on the wrong foot in the early weeks of the Senate's first session with his too-obvious concern for titles, etiquette, and ceremony. Maclay blamed him for all the "fooleries, fopperies, fineries, and pomp" admired by certain Senators taking part in the debate on a title for the President.[6] Even such a friendly critic as Fisher Ames wished that Adams had been "less undisguised" in his insistence on a title of dignity for the President.[7] The Vice President's predilection for aristocratic forms harmonized with the preferences of many of the Senate Members, but a more astute politician might have availed himself of this opportunity to place his leadership on a solid foundation by guiding the Senate on a more constructive course. As it was, he fussily lectured the Senators about their duties and about minor points of procedure, and by a certain peevishness and self-centeredness failed to swing the Senate into line behind his leadership. He was also somewhat handicapped by the scantiness of his electoral vote and by the rather sectional character of his reputation.

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[2] Letter, Abigail Adams to her sister, July 4, 1790, Mitchell, *op. cit.*, p. 54.
[3] Letter, Read to Gunning Bedford, Nov. 30, 1792, Read, *op. cit.*, pp. 542–543.
[4] Letter, Jefferson to Thomas Pinckney, Dec. 3, 1792, Lipscomb. *op. cit.*, VIII, 444.
[5] *Annals*, 4th Cong., 2d sess., Feb. 22, 1797, p. 1555.
[6] Maclay, *op. cit.*, pp. 25, 39, 40, 45, and *passim*.
[7] Letter, Ames to George Richards Minot, May 27, 1789, Ames, *op. cit.*, I, 46.

Moreover, the relations between President Washington and the Vice President were not close. The fact that during the 8 years of Washington's Presidency there were only three recorded occasions of the President asking for Adams' advice on important questions indicates that the latter would not have been the administration spokesman in the Senate even if the President had been inclined to exert legislative leadership.[8]

All of these disadvantages might possibly have been overcome if Adams had conceived of his office as that of leader in pushing through a legislative program and had applied himself to that task. However, Adams conceived of his office as that of presiding officer only; he did not feel that it was his responsibility either to present legislative proposals or to guide such through the Senate. On at least one important issue--that of Senate participation in Presidential removals—Adams endeavored to influence the votes of Senators, but almost invariably his emphasis was on methods of procedure and the arbitration of conflicts between groups of Senators. Adams, who was accustomed to fighting in the political arena himself, chafed under what he considered his duty to sit silently in the Vice President's chair while others fought the great political battles of the time. It is thus not surprising that he termed his post "the most insignificant office that ever the invention of man contrived or his imagination conceived" and that he complained of being "worried to death with *ennui.*" [9]

Although scrupulously punctual in his attendance once in the Capital, Adams on one occasion delayed his arrival in the Capital until the Senate had been in session for a month and frequently left 2 or 3 weeks before adjournment.[10] One reason the Vice President left early was to allow the Senate to choose a President *pro tempore* who would be in line for the Presidency of the United States. However, if this were the only reason for early departure, leaving a day or two before a session's close would probably have been sufficient.

In 1792, even after he had been warned by Hamilton that a tardy arrival would give his enemies a "handle" against him, Adams tarried at Braintree, revealing his phlegmatic attitude toward his Vice Presidential duties in a letter to Senator Rufus King:

> If either the symptoms of brake-bone fever, not wholly subdued, or any Considerations of delicacy, or any other Thing should prevent my attendance in Senate at the beginning of the Session I hope to be excused. There are commonly two or three months at the opening of Congress, when little business is done, and no important Question is decided; so that I flatter myself the Senate will appoint a President for a short time and not be too severe upon me. This entre nous.[11]

Adams' conception of the Vice Presidential office as being that of a presiding officer only was doubtless in line with the purposes of the framers of the Constitution. However, in the hands of a man who saw the need for imaginative legislative leadership, the Vice Presidency might have become an instrument of legislative influence and direction and the upper Chamber might have grasped the initiative in many fields from the House of Representatives.

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[8] Adams, *Works*, VIII, 489–491, 496–497, 515.

[9] Maclay, *op. cit.*, p. 115; Adams, *Works*, I, 460, 465.

[10] *Senate Journal*, 2d Cong., 1st sess., Apr. 17, 1792, p. 184; *ibid.*, 2d Cong., 2d sess., Dec. 5, 1792, p. 18; *ibid.*, 3d Cong., 1st sess., May 23, 1794, p. 149; *ibid.*, 3d Cong. 2d sess., Feb. 16, 1795, p. 68; *ibid.*, 4th Cong., 1st sess., May 3, 1796, p. 294; *Annals*, 4th Cong., 2d sess., Feb. 13, 1797, p. 1547.

[11] Letter, Adams to King, Oct. 11, 1792, King, *op. cit.*, I, 433.

When Thomas Jefferson assumed the chair of the Senate, the relation between the upper Chamber and its Presiding Officer changed considerably—but the Vice Presidency gained no stature as the source of legislative leadership. The reason is not hard to find.

Jefferson accepted the office fully cognizant that the post in itself would not provide an adequate outlet for his talents of leadership. By 1797 it was recognized that the second office in the land was not an executive post. The *Aurora* of December 6, 1796, stated that "the office of Vice President has been kept in a perfectly dormant state *in an executive* sense." Jefferson himself, shortly before entering upon his Vice Presidential duties, wrote that the Constitution would know him only as a legislative officer under the principle of separation of powers.[12] He asserted that he accepted the office because he wanted to avoid giving the impression that he considered the post beneath his dignity.[13]

In addition to the handicap shared with all Vice Presidents of being thrust upon the Senate from the outside, Jefferson in his dealings with the Senate faced the enormous disadvantage of being on the opposite side of the political fence from the majority of its members. In fact, to the Federalist majority Jefferson was the very personification of the "atheistic, Francophile, democratic peril" confronting the Nation. As he presided over the Senate's sessions, he was forced to endure the unpleasant experience of sitting silently by, listening to "philippics against the author of the letter to Mazzei."[14]

However, at the beginning of his term, Jefferson had indulged the hope that the President would hold aloof from the Hamiltonians and rely on the Republicans for support. In an address to the Senate, he spoke highly of the President's "talents and integrity" and emphasized their "cordial and uninterrupted friendship." Unfortunately for their relationship, Adams retained the Hamiltonians in the Cabinet and Jefferson went into open opposition.[15]

While officially President of the Federalist-controlled Senate, Jefferson was active behind the scenes planning and steering the activities of the Republican Party. Using his position as Presiding Officer of the Senate as a listening post, he carried on a frequent and industrious correspondence with Madison, Monroe, and other Republican leaders, giving information about men, measures, and strategy and inspiring them to constant vigilance against Federalist designs. He was so familiar with the legislative and party situation in the Senate that he could often predict very accurately the votes on pending issues.[16] William Vans Murray believed the Vice President was quite successful in weaning gullible Senators over to the Republican side:

> I am inclined to *superstition*, but not to faith, and almost believe in the personal agency of the Devil. *His* influence * * * does I am convinced immense mischief in the Senate. I know several genteel men, with about as much of *science* as I have * * * who I am sure are the dupes of his philosophizing dinners, in which

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[12] Letter, Jefferson to Madison, Jan. 22, 1797, Lipscomb, *op. cit.*, IX, 368. Madison had suggested that the new Vice President could be of valuable assistance to President Adams, especially in foreign affairs. See letter, Madison to Jefferson, Dec. 19, 1796, Hunt, *Writings of Madison*, VI, 298–302.

[13] Letter, Jefferson to Madison, Jan. 22, 1797, Lipscomb, *op. cit.*, IX, 367.

[14] Letter, Theodore Sedgwick to Rufus King, Apr. 9, 1798, King, *op. cit.*, II, 311.

[15] Cited by William O. Lynch, *Fifty Years of Party Warfare* (Indianapolis: Bobbs-Merrill Co., 1931), p. 65.

[16] For examples of Jefferson's leadership by correspondence, see the following letters in Lipscomb, *op. cit.*, X: to James Lewis, Jr., May 9, 1798, p. 37; to Madison, Feb. 5, 1799, p. 95; to Gideon Granger, Aug. 13, 1800, pp. 166–170.

the almost treasonable theories of universal benevolence and philanthropy blend themselves easily with the politics of the day, and are promoted by the satisfactions of the table.[17]

However, voting behavior in the Senate did not confirm such suspicions—or, if Jefferson did convert any Senators, they did not remain converted.[18]

Fisher Ames summarized the Federalists' reaction to Jefferson's activities as Vice President by declaring that he was using the office as a springboard to the Presidency. The Senate would give him no trouble, said Ames; Jefferson would have no casting vote to give and he need bear no responsibility for any measure. But he would go quietly on, affecting zeal for the people, combining the "antis" and malcontents against the President, and then after 4 years take his place.[19]

While President of the Senate, Jefferson not only led the opposition to the party holding a Senate majority, but even denounced the Senate for usurping power at the expense of the House and for serving as a bulwark of entrenched interests. He wanted to see the Senate term reduced and the Senators elected directly by the people.[20] It was natural that he should prefer the House to the Senate in view of the former's direct election by the people and the larger Republican representation therein.

However, in spite of an occasional delay in assuming his duties at the beginning of sessions and early departure at their close, Jefferson took his duties as presiding officer very seriously—so seriously that the *Manual* he prepared to guide the Senate's deliberations is still in use. When he took leave of the Senate to assume the Presidency of the United States, the Chamber—that is, the Republican minority and about half of the Federalists—tendered him a handsome farewell resolution promising future support.[21]

In summary, although the personalities of John Adams and Thomas Jefferson were very different and their relations with the Senate membership presented a number of contrasts, the net result of their services as Vice President was in one respect the same—the Senate did not look to the Vice President for leadership in conducting the chamber's legislative program.

THE ROLE OF THE PRESIDENT PRO TEMPORE

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States. (U.S. Constitution, Article I, Section 3.)

Since the President *pro tempore* was elected by the Senators themselves and presumably enjoyed their confidence, it might be expected that he would furnish the legislative leadership which the Vice President did not provide. However, the status of this office as interpreted by the Senate in these formative years made it equally impossible for the President *pro tempore* to provide the impetus behind the legislative program.[22]

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[17] Letter, Vans Murray to John Quincy Adams, Aug. 23, 1797, cited by Charles, *op. cit.*, pp. 86–87, from *American Historical Association Report for 1912*, p. 360.

[18] Charles, *ibid.*, pp. 86–89.

[19] Cited in McMaster, *op. cit.*, II. 307.

[20] Lipscomb, *op. cit.*, IX, *passim*.

[21] *Senate Journal*, 6th Cong., 2d Sess., Mar. 2, 1801, pp. 107–108.

[22] Jefferson's *Manual*, sec. IX, specified that the President *pro tempore* be chosen by ballot.

One difficulty lay in the fact that the President *pro tempore* was elected for the period of the Vice President's current absence only:

> His office is understood to be determined [terminated] on the Vice-President's appearing and taking the chair, or at the meeting of the Senate after the first recess.[23]

This meant that the term of the President *pro tempore* was short and uncertain, giving the office a random character fatal to a position of leadership. During the period 1789 to 1801 14 different Senators occupied the office—John Langdon, Richard Henry Lee, Ralph Izard, Henry Tazewell, Samuel Livermore, William Bingham, William Bradford, Jacob Read, Theodore Sedgwick, John Laurance, James Ross, Uriah Tracy, John E. Howard, and James Hillhouse.[24]

Equally significant was the fact that in choosing a President *pro tempore* the Senators had no intention of naming a field marshal for a legislative campaign. Many of the men named to the post, although obviously popular with their colleagues, were not recognized leaders.

The first President *pro tempore* was John Langdon of New Hampshire, affable and wealthy merchant, patriot, and former Governor of the Granite State. He was first elected to the office for the sole purpose of counting the electoral votes for President and Vice President in 1789 and shortly thereafter was elected to serve until John Adams was inaugurated. Later he served during Adams' absence. He apparently received this recognition not because he was looked to for leadership but because of his contributions to the revolutionary cause and his gracious and sociable manner. He appeared to good advantage in the Presiding Officer's chair, where he was described as "attentive, prompt, and impartial." [25] In this capacity his services evidently satisfied his colleagues, who reelected him in 1792 and again in 1793.

During the first years of his Senate service Langdon ardently supported the Hamilton fiscal program. His experience in financial matters led him strongly to support assumption and the Bank of the United States. On the other hand, he had much in common with the nascent Jeffersonian democracy—a friendly feeling for republican France and a faith in the common man. As time went on, he apparently became convinced that the Hamiltonians were conspiring to establish a monarchy. Also, he was closely identified with the French West Indian trade and found the Federalists unsympathetic with his demands for retaliation against British interference with that trade, which had been newly opened to Americans during the Anglo-French war. By 1794 he had become so much a Jeffersonian that Adams, believing that Langdon would again be named Presiding Officer in his absence, felt he could not leave the Capital.[26]

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[23] *Ibid.*, sec. IX.

[24] *Senate Manual* (1943 ed.), p. 483.

[25] John Langdon Elwyn, "Some account of John Langdon," *Early State Papers of New Hampshire*, ed. by Albert Stillman Batchellor (Concord: Ira C. Evans, 1892–93), XX, 874–878.

[26] Mayo, *op. cit.*, pp. 240–246. See also letter, Adams to his wife, Mar. 15, 1794, Adams *Works*, I, 468.

Adams' statement, "the President *pro tem.* has lately taken it in his head to shift his box," seems to indicate than Langdon filled that office even during the presence of the Vice President. However, since the *Annals* and the *Senate Journal* imply—and Jefferson's *Manual*, definitely states—that the office of president *pro tempore* terminated with the reappearance of the Vice President, it seems likely that Adams used the term "President *pro tem*," loosely, referring to Langdon's past elections and possible future election to that office. Actually, Ralph Izard, of South Carolina, was elected 2½ months after Adams' letter was written.

Even more striking than Langdon's repeated election was the choice of Richard Henry Lee, of Virginia, in 1792 and that of Henry Tazewell, also of the Old Dominion, on two separate occasions in 1795. Lee had been an ardent opponent of the Constitution in the Virginia ratifying convention and in 1792 was closely identified with the States' rights school which was so bitterly critical of the fiscal program approved by the Senate majority. However, he was a member of a distinguished Virginia family, in June 1776 had introduced the motion that led to the Declaration of Independence, and thereafter had served long and arduously in the patriot cause in the Continental Congress.

Henry Tazewell, when first elected President-*pro tempore* on February 20, 1795, had served in the Senate less than 2 months. Moreover, he was a stout Republican in a Chamber predominantly Federalist—and this was a year in which party passions were at fever pitch over the Jay Treaty. Nevertheless, he was dignified and genial; in fact, one authority described him as perhaps the most popular Virginian of his day—an appellation of no small moment considering the caliber of the rivals for that honor.[27] Such qualities apparently carried great weight in selection of Presidents *pro tempore* in that day.

Others of the 14 Presidents *pro tempore* who served during the period under discussion—men like William Bingham, Theodore Sedgwick, and Uriah Tracy—were recognized leaders of the Senate's Federalist majority. Still others—men like William Bradford, of Rhode Island—although of Federalist persuasion had taken a fairly inconspicuous part in the work of the Senate. On the other hand, outstanding Federalist leaders like Ellsworth, King, Cabot, and Strong were not elected to the office.

The observer who tries to follow the reasoning of these early Senators in their choice of Presidents *pro tempore* must confess himself baffled, because men of such widely divergent experience, prestige, seniority, and political orientation were named—during a period when the same party never failed to command a Senate majority.

Nor was the post particularly sought after. Izard declined the office in 1792, Livermore in 1795. Bingham considered it a "mixed blessing" because it interfered with his personal business affairs. Yet the office carried enough prestige to impel Wingate of New Hampshire in 1792 to vote for his colleague, John Langdon, "for the honor of the State." [28]

The Senate's casual attitude toward the office is especially surprising in view of the fact that Congress, by an act of 1792, provided that in the event of a vacancy in both the Presidency and Vice Presidency of the United States, the President *pro tempore* of the Senate (and after him the Speaker of the House) would succeed to the Chief Magistracy of the Nation. At the time this act was under consideration in Congress, an effort was made by the House to substitute the Secretary of State for the Senate's President *pro tempore* in order to preserve the separation of powers between the executive and legislative branches. However, when the Senate refused to accept this substitution, the

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[27] *Dictionary of American Biography*, XVIII, 354–355.

[28] Letter, Wingate to President Bartlett of New Hampshire, Nov. 8, 1792, Wingate, *op. cit.*, II, 410–411; *Senate Journal*, 3d Cong., 2d sess., Feb. 20, 1795, p. 73; Margaret L. Brown, "William Bingham, Eighteenth Century Magnate," *Pennsylvania Magazine of History and Biography*, LXI (October 1937), 394.

House finally receded from its amendment. The Senate's President *pro tempore* remained second in line for the Presidency until 1886.[29]

In 1801, when the presidential election was referred to the House of Representatives due to the electoral-college deadlock between Jefferson and Burr, there was some talk of the Federalists, who then had a House majority, preventing the election of a President by refusing to break the tie vote—thus leaving a vacancy in both the Presidency and Vice Presidency and making the President *pro tempore* of the Senate the President of the United States. No less a personage than President Adams pronounced the scheme perfectly legal:

> I know no more danger of a political convulsion, if a President, *pro tempore*, of the Senate, or a Secretary of State, or Speaker of the House, should be made President by Congress, than if Mr. Jefferson or Mr. Burr is declared such. The President would be as legal in one case as in either of the others * * *.[30]

However, it is doubtful if the proposal had a great deal of support. Few Federalists had the temerity publicly to espouse it. Alexander Hamilton was resolutely against it as being "a most dangerous and unbecoming policy"—as well as being doomed to failure because many Republicans would prefer Burr to a Federalist President *pro tempore* of the Senate.[31]

Republicans, for their part, threatened armed revolt if such a usurpation were attempted. Jefferson is quoted as stating that "one and all, that the day such an act was passed, the Middle States would arm, and no such usurpation should be submitted to." John Randolph, of Roanoke, later added, "Had we not the promise of Darke's Brigade, and of the arms at Harper's Ferry, which he engaged to secure?" As it turned out, no such desperate measures were needed, since the House Federalists relented sufficiently to allow Jefferson to be elected President.[32]

On February 28, 1801, Jefferson, in a very courteous farewell to the body over which he had presided for 4 years, announced that he was retiring from the Senate chair a few days early for the express purpose of giving the Senate the usual opportunity of electing a President *pro tempore*—who would be second in line for the Presidency.[33]

PRESIDENTIAL LEADERSHIP: WASHINGTON

The Philadelphia Convention evidently had in mind a certain amount of initiative by the President of the United States in the legislative process, for it placed in the Constitution the requirement that the Chief Executive should:

> * * * from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge

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[29] *Annals*, 2d Cong., 1st sess., Jan. 2, 1792, pp. 302–303, Feb. 9, 1792, p. 401, Feb. 21, 1792, p. 417: letter, Joseph Jones to Madison, Mar. 2, 1792, *Massachusetts Historical Society Proceedings*, XV (June 1901), 136–137; McConachie, *op. cit.*, pp. 332–333.

[30] Letter, Adams to Elbridge Gerry, Feb. 7, 1801, Adams *Works*, IX, 98; *National Intelligencer*, Jan. 14 and 23, 1801.

[31] Letter, Hamilton to Gouverneur Morris, January 9, 1801, Lodge, *Works of Hamilton*, X, 407–408.

[32] Jefferson's and Randolph's remarks are cited in William Cullen Bryant and Sydney Howard Gay, *Popular History of the United States* (New York; Charles Schribner's Sons, 1878–80), IV, 144–145.

[33] *Senate Journal*, 6th Cong., 2d sess., Feb. 28, 1801, p. 99.

> necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them * * *.[34]

The contribution of the first President to the successful inauguration of the constitutional system can hardly be overestimated. Without his prestige, ability, and strength of character at its head, it is doubtful if the new Government would have survived. It was quite natural that his standing in the Nation should give great weight to his recommendations to Congress.

However, President Washington took a limited view of his constitutional powers with respect to legislation. Following the strict letter of the Constitution, he confined himself to giving Congress information and making recommendations. He considered it "indelicate" to exert other pressure on the legislative branch and scrupulously respected its independence. Even in connection with such a clearly recognized Presidential power as the veto, he limited himself to negativing acts of Congress which he considered in plain violation of the Constitution.

Washington's efforts to influence the legislative process consisted principally of (1) making recommendations involving matters affecting the President's treatymaking power or his position as Commander in Chief of the Armed Forces—fields in which he had special responsibilities and peculiar competence; (2) calling the attention of Congress to situations within the executive departments which required correction by legislation; and (3) suggesting topics for future legislative consideration, without recommendation as to what action should be taken on such topics.

For instance, Washington was especially concerned about legislation to promote defense against, and peaceful relations with, the Indians of the western frontier.[35] On such questions, he was occasionally quite specific about the type of action he had in mind, but usually pointed out ends desired rather than specific legislative provisions necessary to accomplish them.[36]

The recommendations in Washington's annual messages and the topics he submitted as areas in which legislation was desirable were used by the Senate as a partial agenda for the session in question. In many cases, the Senate responded to recommendations by the President by immediately appointing committees to report bills designed to accomplish the object desired. In other cases, of course, initial action was left to the House.

Taking Washington's message to Congress at the commencement of the third session of the First Congress as an illustration, Presidential recommendations impelled the Senate to name committees almost immediately to consider the subjects of protection of American trade in the Mediterranean, regulations affecting American consuls abroad, and adoption of a uniform system of weights and measures.

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[34] U.S. Constitution, art. II, sec. 3.

For discussions of the relations between the President and Congress during this period, see Hart, *op. cit.*; Leonard D. White, *op. cit.*, and Ralph Volney Harlow, *History of Legislative Methods in the Period Before 1825* (New Haven: Yale University Press, 1917). The latter work refers chiefly to the lower House.

[35] See Washington's messages to the Senate Aug. 7, 1789, *Senate Journal*, 1st Cong., 1st sess., pp. 89–90; Nov. 6, 1792, *ibid.*, 2d Cong., 2d sess., pp. 5–7; Dec. 3, 1793, *ibid.*, 3d Cong., 1st sess., pp. 5–9; Feb. 2, 1796, *ibid.*, 4th Cong., 1st sess., p. 65.

[36] *Ibid.*, 4th Cong., 1st sess., Mar. 15, 1796, pp. 105–106.

In addition to approving legislation dealing with the first two of these subjects, the Senate during the course of the session followed the President's recommendations by passing bills or taking other substantial action on such important subjects as admission of Kentucky to the Union, protection of the frontiers, further provision for the militia, establishment of a mint, and reduction of the national debt. Other subjects of legislation suggested by the President such as a uniform system of weights and measures and sale of western lands were seriously studied and for valid reasons postponed for future action. Since the session automatically expired on March 3, 1791, Congress did not have time to complete action on some of the Presidential recommendations, and some projected legislation was caught in the closing rush.[37]

Contrasting viewpoints regarding President Washington's influence over Congress are illustrated by letters written in 1794 by Chauncey Goodrich, a stanch Federalist from Connecticut, and by James Madison, then a Member of the House. Writing to Oliver Wolcott, the former commented:

> Our sober folks regret the want of union in Congress, and think it strange they divide so uniformly on almost all questions: they say, General Washington will at last set them right; they yet look up to him more than they do to the Almighty, for they think he is nearer to them, and have no doubt of his ability and will to do them good.[38]

Referring to Washington's recommendations regarding an increase in the size of the Army, Madison wrote Jefferson:

> The influence of the Ex on events, the use made of them, and the public confidence in the P. are an overmatch for all the efforts Republicanism can make. The party of that sentiment in the Senate is completely wrecked; and in the H. of Rep^s in a much worse condition than at an earlier period of the Session.[39]

Yet, in spite of the weight given to his recommendations, Washington did not picture himself as a legislative leader. He indicated that he would give his views on pending legislation to a friend *if asked*, but otherwise confined himself to making recommendations and referring to Congress subjects on which he considered legislation necessary—and then left the rest to the legislators. The exceptions to this rule were few. In 1790 he suggested to Attorney General Randolph that he discuss proposed amendments to the Judiciary Act with Members of both Houses especially acquainted with the subject; the same year Washington himself talked with Senators Carroll and Izard in an effort to reverse in the Senate a House reduction of the Foreign Service appropriation.[40] Generally, however, he rarely went further than authorized by the strict letter of the Constitution. His personality was unsuited to the rough-and-tumble tactics of the legislative arena. It is difficult to imagine the dignified Washington mixing informally with Members of Congress and pressing the desirability of his pet measures. His conception of the Presidency was rather that of a somewhat aloof "head of State."

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[37] For the Presidential message referred to, see *Senate Journal*, 1st Cong., 3d sess., Dec. 8, 1790, pp. 6–8. For Senate action on the recommendations, see *ibid., passim.*

[38] Letter, Goodrich to Wolcott, Mar. 10, 1794, Gibbs, *op. cit.*, I, 131.

[39] Letter, Madison to Jefferson, May 25, 1794, Hunt, *Writings of Madison*, VI, 217.

[40] Letter, Washington to Randolph, Jan. 21, 1790; Fitzpatrick, *Writings of Washington*, XXXI, 9–10; Fitzpatrick, *Diaries of Washington*, entry dated May 7, 1790, IV, 128.

Presidential Leadership: Adams

Believing strongly in the separation of powers—in the independence of both the executive and legislative branches—President John Adams endeavored to continue the policy of his predecessor with respect to legislative leadership. His first annual message to Congress dealt almost wholly with national defense and foreign relations—fields in which the Chief Executive had special responsibilities. His recommendation respecting a tax program to support the firm but impartial foreign policy he advocated was couched in very general terms.[41] In his subsequent messages he continued the practice of submitting the general objects of legislation he considered desirable and then leaving the accomplishment of those objects to the good judgment of Congress.

Adams began his term with a predisposition to harmony with the Senate. He entered the Presidency fresh from 8 years' service as its Presiding Officer. Moreover, he had long been vocal in behalf of a strong upper Chamber, which comported well with his belief in a responsible, conservative government. He bitterly resented what he considered the tendency of the House of Representatives to "scramble for power against the President and the Senate." [42] A year after his inauguration, he was quoted by Jefferson as stating:

> No republic can ever be of any duration without a strong Senate, and a Senate deeply and strongly rooted, strong enough to bear up against all popular storms and passions. The only fault in the Constitution of our Senate is, that their term of office is not durable enough. Hitherto they have done well, but probably they will be forced to give way in time.[43]

Despite the fact that many prominent Federalist Senators tended to look to Hamilton for leadership rather than the President, the relations between the Senate and Adams during the first 2 years of the latter's term were cordial. Senate replies to the President's messages were friendly and cooperative. Its Federalist majority was pleased with Adams' firm tone in dealing with the French crisis, especially the XYZ affair. Time and time again the Senate with alacrity appointed committees to act upon the President's recommendations.[44]

However, even during this period the Senate steered an independent course, its Federalist leaders being more interested in bringing about a state of war with France than in following the defensive policy advocated by the President. Adams' grandson and biographer, Charles Francis Adams, complained bitterly that the President "seems scarcely to have been consulted by the active men." [45] The President had no hand in suggesting the Alien and Sedition Acts, the most momentous legislation of the period.

In 1799 the divergent convictions of the President and the Senate Federalists with respect to the handling of the French crisis led to a complete break between the Chief Executive and the Senate. On February 18, without consulting any member of his Cabinet or any of the Senate leaders, the President submitted to the Senate the nomination of William Vans Murray as special envoy to Paris to attempt to restore harmony with France. The Senate Federalists interpreted this as a declaration of war. Although they felt it would be impolitic to block the appointment, they further alienated the President by "presuming" to modify the mission by appointment of two additional members.[46] Thereafter the relations between President and Senate were strained, to say the least.

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[41] *Annals*, 5th Cong., 1st sess., May 16, 1797, pp. 54–59.

[42] Letter, Adams to his wife, Apr. 16, 1796, Adams *Works*, II, 221–222.

[43] Letter, Jefferson to Madison, Feb. 22, 1798, Lipscomb, *op. cit.*, IX, 445–446.

[44] *Annals*, 5th Cong., 1st sess., May 23, 1797, pp. 12–14; *ibid.*, 5th Cong., 3d sess., Dec. 11 and 18, 1798, pp. 2192–2196; *Senate Journal*, 5th Cong., 2d sess., Nov. 27, 1797, pp. 19–23; letter, ex-Senator George Cabot to Oliver Wolcott, May 31, 1797, Gibbs, *op. cit.*, I, 540; letter, Cabot to Wolcott, June 9, 1798, *ibid.*, II, 53.

[45] Adams *Works*, I, 521–522.

Adams was extremely bitter against what he termed "combinations of senators, generals, and heads of department" and was now determined to be no more "in the power of a party" than the Constitution forced him to be.[47] In a conversation with Senator Benjamin Goodhue, he claimed that certain Senate measures were sponsored with the deliberate object of wounding his feelings. Included in the charge was the claim that the Senate had "crammed Hamilton down his throat" as second in command of the Army. Furthermore, the Senate, influenced by Hamilton and Secretary of State Timothy Pickering, had rejected the nomination of the President's son-in-law, Col. William S. Smith, as Adjutant General, an act which (figuratively) "killed his daughter." Adams apparently believed that the Senate deliberately tried to ruin him and his family.[48]

Writing 10 years later, President Adams claimed that when his March 1799 message failed to recommend war with France, the Federalists in Congress called a caucus to determine if they could obtain a declaration of war without the President's recommendation, but that Hamilton's friends could not muster the necessary votes.[49]

The following year, when Adams' term was nearly over, the Senators seem to have relented somewhat in their opposition to the President. Their reply to his annual message—unlike that of the previous year—was again very cordial.[50]

History has vindicated Adams' determination to seek peace with France even at the price of alienating the Senate's powerful Federalist majority, a group which could normally have been expected to be the strongest bulwark of his administration . However, Adams' conduct during this crisis also exhibited his shortcomings in the strictly political aspects of the Chief Executive's duties. Over-sensitive, jealous, and self-centered, he failed even to try to win the Senators to his line of action, with results that will be outlined in the following chapter.

THE CEREMONY OF THE "SENATE'S REPLY"

The preceding paragraphs have included a number of references to the replies of the Senate and House to the President's annual message to Congress. These replies were a characteristic feature of congressional procedure during the Federalist period and reveal much about the political climate of the day.

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[46] See ch. VIII, *supra.*

[47] Letter, Adams to Attorney General Charles Lee, Mar. 29, 1799, Adams *Works,* VIII, 629.

[48] Letter, Pickering to Rufus King, June 26, 1800, King, *op. cit.,* III, 262 ; letter, Benjamin Goodhue to Pickering, June 2, 1800, *ibid.,* III, 263–264.

It is probable that the Senate's rejection of the President's son-in-law was based on other grounds ; in fact, Adams himself had serious doubts about Smith's character. See letter, Adams to Smith, Dec. 19, 1798, Adams *Works,* VIII, 617–618, and letter, Adams to Smith, May 22, 1799, *ibid.,* VIII, 652.

[49] "Letters to the *Boston Patriot,*" No. XVIII, cited by Gibbs, *op. cit.,* II, 210.

[50] *Senate Journal,* 6th Cong., 2d sess., Nov. 25, 1800, pp. 16–18.

It was the custom of both President Washington and President Adams to present their annual messages to Congress in person. After the departure of the President, the Senate and House appointed committees to draft replies, which in greater or lesser detail commented on the contents of the address and in most cases promised action in the areas where the President suggested that legislation was desirable. These committee drafts were then debated on the Senate and House floors—sometimes at great length—perhaps amended, and finally adopted, often by a record vote.

Each House then arranged with the President for a time when its Members could present the reply to the Chief Executive. At the time appointed, each House, acting independently of the other, boarded carriages for the short ride to the Executive Mansion, where the Members filed into the President's reception room and stood by rather awkwardly while the Vice President (or, in at least one case, the President *pro tempore*) on behalf of the Senate and the Speaker on behalf of the House read the prepared reply, to which the President responded with a brief word of thanks. This ceremony was repeated at the beginning of each session from 1789 to 1800. It was probably based on precedents established in the States by legislatures and Governors.[51]

The custom had certain merits. It gave each House opportunity to discuss, in a general way, the state of the Nation and the overall legislative situation, giving the Members a panoramic view of the tasks of the session. It made possible crystallization of congressional opinion early in the session. It revealed the general party complexion of the two Houses, enabling both the President and the congressional leaders to anticipate how much support the administration could count on during the weeks to follow. Both Washington and Adams awaited adoption of the replies with some eagerness.[52]

Even Republicans—after the custom had been abandoned—had good words to say about the practice. John Randolph of Roanoke remarked in 1809 that the former custom—

> was in fact the greatest opportunity which the opposition to the measures of the Administration had of canvassing and sifting its measures * * * without there being any question raised whether the gentleman was in order or not * * *.[53]

The custom gave Congress opportunity verbally to support Executive pronouncements on foreign policy and thus put foreign powers on notice that the President's policy represented the will of the Nation. Furthermore, the general discussions leading to adoption of the congressional replies performed the useful function of informing the Nation. At least the House debates did. Even after Senate sessions were opened to the public, the press seldom considered it worthwhile to report the discussions "upstairs." [54] The custom may have contributed something to "that harmony of intercourse which ought to subsist between the legislature and the President," which, according to Senator King, was the object of the Senate reply.[55]

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[51] The practice of the oral reply to the President's message is discussed by Charles Warren in an article "Why Jefferson Abandoned the Presidential Speech to Congress" in *Massachusetts Historical Society Proceedings*, LVII (November 1923), 123–172.

[52] Letter, Washington to Oliver Wolcott, May 29, 1797, Gibbs, *op. cit.*, I, 540; letters, Abigail Adams to her sister, May 24, 1797, and June 3, 1797, Mitchell, *op. cit.*, pp. 92–95.

[53] *Annals*, 11th Cong., 1st sess., May 26, 1809, p. 92.

[54] See ch. XIV, *supra*.

[55] *Annals*, 4th Cong., 1st sess., Dec. 11, 1795, pp. 15–23.

On the other hand, the custom was open to several objections. If the reply, after vigorous debate, reflected a forthright stand on a controversial issue, the defeated minority objected to being party to a policy statement with which it was out of sympathy. For instance, in 1795 southern Republicans like Virginia's Stevens T. Mason and South Carolina's Pierce Butler took sharp exception to paragraphs in the proposed Senate reply which seemed to imply approval of the Jay Treaty. The proposed wording would give the erroneous impression, said Mason, that the treaty's opponents had receded from their opinion.[56]

Members of the Republican minority further objected to policy statements in the Senate's replies on the basis that they expressed opinions prematurely—before regular discussion—and pledged Members to pursue particular courses which subsequent study might show to be improper. They recommended, therefore, that the reply should be in general terms and so worded as to adduce unanimous approval. However, such a reply was, of course, open to the reverse criticism that it was a meaningless and empty form.

If congressional replies to Presidential messages gave Congress opportunity to reinforce Executive statements on American foreign policy, they also gave Congress opportunity to strike out independently in the field of foreign relations and thus embarrass the President's leadership. In 1797, Hamilton wrote to Wolcott:

> I like very well the course of the Executive conduct in regard to the controversy with France, and I like the answer of the Senate in regard to the President's speech.
>
> But I confess, I have not been well satisfied with the answer reported in the House. It contains too many hard expressions; and *hard words* are rarely useful in public proceedings.[57]

The same year, Charles Cotesworth Pinckney suggested that anti-French Senate and House replies to a Presidential message had been a contributing factor in his dismissal by the French Directory.[58]

Republicans took delight in ridiculing Senate Federalists for their "servility" in adopting replies which "echoed" the opinions expressed in the President's messages. These "echoes," sneered the critics, smacked strongly of the sycophancy of decadent European courts. A certain "Pittachus" writing in the *Aurora* asked the "well-drilled echoists of noble and senatorial port" in what part of the Constitution Congress is enjoined to echo the President. He answered his own question by declaiming that the Constitution did not recognize the practice of royal procession or regal speech nor degraded legislators to the "Lilliputian office of echoists." [59]

A more justifiable criticism of the practice was the great amount of time consumed in preparing and debating the replies. In view of the uses of the practice, the time thus spent was not, of course, a sheer waste, but it is probable that the time would often have been better spent debating actual legislation than broad but ill-defined theoretical considerations. For instance, during the first session of the Fifth Congress, the lower House spent a week and a half discussing its reply to the President's message, often dilating on questions of foreign policy which would not be reflected in legislation coming before the House.[60] In the Senate, with its smaller membership and well-knit Federalist leadership, this problem was less acute, but even as early as 1790 Senator Maclay complained that useful work was being neglected in favor of preparing mere "compliments" to the President. He suggested that, rather than spending time preparing an "echo" of the President's address, the Senate should immediately appoint a committee to determine on what parts of the message the Senate could act and then appoint further committees to bring forward the necessary bills.[61]

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[56] *Ibid.*

[57] Letter, Hamilton to Wolcott, June 6, 1797, Lodge, *Works of Hamilton*, X, 268.

[58] Letter, Charles Cotesworth Pinckney to the Secretary of State, *American State Papers, Foreign Relations* (Washington: Gales and Seaton, 1832–61), II, 18.

[59] *Aurora*, Dec. 23, 1795.

Jefferson believed the disadvantages outweighed the advantages and sent his messages in writing—a form which neither House believed called for the ceremony of the traditional reply. His successors followed this precedent for 112 years.

Jefferson gave nonpolitical reasons for the change: The convenience of Congress, economy of its time, relief from the necessity of giving immediate answers on subjects not yet fully before its Members, as well as the physical circumstances under which President and Congress found themselves in the wilderness Capital.[62] However, it is possible that he was also influenced by his own malaise on a speaker's platform and by Republican aversion to the allegedly "monarchical" character of the personally-delivered message and its congressional "echo."

Leadership by Individual Senators

From the wording of the Constitution, it appears that its framers anticipated that the two Houses of Congress would deliberate as groups of individual Members—each House was to frame legislation as a joint project of its entire membership. The President of the Senate and the Speaker of the House were to be merely presiding officers to enforce the rules and to see that the legislative traffic flowed smoothly. The President of the United States was to be a source of information on the state of the Union and of recommendations as to possible action. But it was to be strictly up to the membership of the two Houses to accept or reject such Presidential advice and to take full responsibility for initiating and perfecting the necessary legislation.

As has been emphasized, neither President, Vice President, or President *pro tempore* went beyond these expectations during the period under discussion. Yet without leadership in its legislative deliberations the Senate could not have achieved the measure of success it enjoyed. This vacuum was filled by individual Senators, by the Secretary of the Treasury working through his friends in the Senate, and later by the Federalist Party.

The leading Member of the First Congress was, by all odds, James Madison, House Member from Virginia. It was he who started the legislative wheels turning on the first revenue act, on the legislation establishing the executive departments, and on the Bill of Rights. He was a close friend and confidant of President Washington. He took the House floor 124 times in the first session, far more often than anyone else.[63] His unsmiling industry and application to business could brook no frittering away of the precious time of the infant Government.

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[60] *Annals*, 5th Cong., 1st sess., May 22, 1797, to June 2, 1797, pp. 67–234.

[61] Maclay, *op. cit.*, pp. 175–176.

[62] Letter, Jefferson to the Senate, Dec. 8, 1801, cited in Henry Adams, *History of the United States of America* (New York: Charles Scribner's Sons, 1889–91), I, 248. See also Wilhelmus Bogart Bryan, *op. cit.*, I, 379.

OLIVER ELLSWORTH

With so many of the essential bills originating in the House, the Senate felt it could afford to spend much of its time during its first weeks debating a title of dignity for the President. However, immediately after achieving its first quorum, the Senate did set to work on one important piece of legislation—the first Federal Judiciary Act. The initiative was taken by Oliver Ellsworth of Connecticut, who during his 7 years in the Senate assumed more responsibility, did more work, and exerted more practical leadership in the day-by-day activities of the upper Chamber than any other Member of that body.

Ellsworth, not quite 44 years old when he entered the Senate, was a member of an old Connecticut family, studied at Yale and Princeton, began law practice under straitened circumstances, and then worked his way to the top of the Connecticut bar. During the Revolution he served in his State's assembly, was a member of a committee which managed the State's military finances, and in 1778 became a delegate to the Continental Congress. After serving as a member of the Governor's Council from 1780 to 1784, he became a judge of the State's superior court. He was an active member of the Constitutional Convention and afterward fought hard and successfully for the new system in the Connecticut ratifying convention. With this background of experience, a reputation for integrity, and a fine personal presence, Ellsworth immediately won the respect of his colleagues. However, it was his capacity for solid work—his recognition of the fact that in the senatorial office drudging spadework was even more important than speeches and votes—that caused him to forge to the top in the newly organized Chamber.

On April 7, 1789, the day after the Senate finally obtained its first quorum, Ellsworth was elected chairman of both of the upper Chamber's first two committees—one to prepare a bill establishing a Federal judiciary and the other to prepare rules of procedure and provide for appointment of chaplains. The influence of these committees' labors can be seen in the Federal judiciary and in the Senate rules even today. The Connecticut Senator not only drafted the judiciary law but guided it through the Senate, defending it with warmth and eloquence.[64]

It will be recalled that since the Senate during this period chose a new committee for each new task, the extent of each Senator's leadership and labor could be determined rather accurately by the number and importance of the committees to which he was elected. By this standard Ellsworth comes into focus as the most eminent of the first Senators, from the standpoint of both his standing among his colleagues and the extent of his contribution to the Senate's labors. In the second session of the First Congress he served on 36 committees, in many cases as chairman, while his colleagues served on an average of 11. Five years later he served on 23, compared to an average of 6 for his fellow Senators.[65]

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[63] Brant, *James Madison: Father of the Constitution*, pp. 246–268. But to call Madison the "majority leader" as Brant did (*ibid.*, p. 255) or "administration leader," as Schouler did (Schouler, *op. cit.*, I, 93) is to state his role rather inexactly. Sentiment in Congress was not crystallized sufficiently in 1789 to justify the term "majority," while the title "administration leader" implies the role of Presidential spokesman, which the Virginia Representative was not. The many valuable services Madison rendered Washington were in the nature of assistance to the President in performing the latter's own duties rather than in sponsoring an executive-inspired legislative program in Congress.

[64] For an excellent account of Ellsworth's Senate service, see William Garrott Brown, *Life of Oliver Ellsworth* (New York: Macmillan Co., 1905), ch. v, pp. 177–237. Unlike many biographers, Brown did not stretch the facts in describing the Connecticut Senator's role. Perusal of the *Senate Journal* reveals the great extent to which Ellsworth assumed the burden of the work of the Senate.

Maclay described Ellsworth as "all-powerful and eloquent in debate." [66] Aaron Burr, who served with the Connecticut Senator from 1791 to 1796, remarked that the latter's influence in the Senate was so great that if he should spell the name of Deity with two "t's" it would take the Senate 3 weeks to expunge the superfluous letter.[67] John Adams described him as the "firmest pillar" of Washington's whole administration in the Senate, while William Vans Murray said that he had—

> a head of iron—just iron—that works with the precision of a mill without its quickness and giddy manner. I profoundly admired the neatness and accuracy of his mind.[68]

The Senators of 1957 ignored the most effective of their earliest predecessors when they failed to include Ellsworth in the Senate's "hall of fame."

Hamilton and His Senator Friends

Nevertheless, the impetus behind the major legislative program during Washington's administration did not come from either Madison or Ellsworth—or any other Member of Congress—but from Alexander Hamilton.

The first session of the First Congress passed comparatively quietly. Its important accomplishments—establishing the executive departments and the judiciary, laying the foundations for the national revenue, and initiating what were to become the first 10 amendments to the Constitution—produced differences of opinion, to be sure, but did not involve fundamental conflicts. The great conflict over basic issues arose with appointment of Alexander Hamilton as Secretary of the Treasury in September 1789, and the subsequent presentation of the great fiscal program so closely identified with his name.

The story of Hamilton's role in conceiving and sponsoring the fiscal policies which put the new Government on a sound financial footing has been told and retold so often that it need not be repeated here. It should be noted, however, that Hamilton's self-imposed task involved *legislative* as well as executive leadership. The Secretary realized that the Constitution, while providing admirable legislative and executive machinery, had made inadequate provision for cooperation between the President and Congress and for motive power to put the legislative machinery into motion. He had both the talent and the inclination to supply both deficiencies.

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[65] See ch. XIII, *supra*.

[66] Maclay, *op. cit.*, p. 369.

[67] "Oliver Ellsworth," *National Cyclopedia of American Biography*, I, 22.

[68] Letter, Adams to James Lloyd, January (no day), 1815, Adams *Works*, X, 231–232; letter, Murray to John Quincy Adams, Nov. 7, 1800, Worthington Chauncey Ford (ed.), "Letters of William Vans Murray to John Quincy Adams, 1797–1803," *American Historical Association, Report for 1912*, p. 358.

The hypercritical Maclay said that he considered Ellsworth "a miserable draftsman" of legislation, but this opinion was apparently not shared by the other Senators.

In view of the fact that Washington considered it "indelicate" to attempt to guide Congress in its legislative activities and was careful not to trespass on Congress' constitutional preserve, it may cause surprise that he permitted his subordinate, the Secretary of the Treasury, to present to Congress a broad legislative program and then use all the means at his command to push it through Congress.

The answer lies in the fact that Congress, in its act establishing the Treasury Department, apparently intended to make that Department an adjunct of Congress as well as a part of the executive branch. Only with respect to removal of its officers was the President mentioned in the act, while the Secretary's responsibility to Congress was made very clear:

> It shall be the duty of the Secretary of the Treasury to digest and prepare plans for the improvement of the revenue, and for the support of the public credit * * * to make reports and give information to either branch of the Legislature, in person or in writing, (as he may be required,) respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office.[69]

On the other hand, the acts establishing the War Department and the Department of Foreign Affairs made their heads responsible solely to the President.[70]

Since revenue legislation must originate in the House and Members of that body from the very beginning claimed primacy with respect to all matters involving finance, Hamilton addressed most—but not all—of his famous "reports" to the lower Chamber, pursuant to orders from that body. However, the Senate received copies of these reports.

The Secretary did not, of course, base his reports on principles existing only in his own mind, but gave concrete form to measures which had been discussed by leading statesmen in and out of the Constitutional Convention for months. Many of these statesmen were now Members of the Senate or House and were prepared to support Hamilton's recommendations and give them legislative form.[71]

In the Senate, the Secretary could count fully on the support of a number of loyal associates—especially Oliver Ellsworth, Caleb Strong, George Cabot, Robert Morris, Rufus King, and Philip Schuyler.

Schuyler was, of course, the Secretary's father-in-law. Robert Morris, upon declining the Treasury post for himself, had strongly urged on the President the appointment of young Hamilton. Rufus King owed his election to the Senate largely to the Secretary's influence in the New York Legislature.[72]

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[69] *Annals*, 1st Cong., 1st sess., p. 2231.

Leonard D. White concluded that Washington was fully aware of, and approved, Hamilton's congressional activities. See Leonard D. White, *op. cit.*, pp. 57–58.

[70] *Annals*, 1st Cong., 1st sess., pp. 2187, 2214. See also Leonard D. White, *op. cit.*, chs. iv, v, vi, and vii, and Harlow, *op. cit.*, ch. viii.

[71] Jefferson, as Secretary of State, vigorously denied ever having had any desire to influence Members of Congress. However, in 1791 he drafted a bill to promote the useful arts which was introduced in the House by Alexander White of Virginia. In 1792 he corresponded with Hugh Williamson of North Carolina regarding legislation to revise the patent law and made changes in Williamson's draft. He also appeared before Senate committees or furnished them information by letter. See Leonard D. White, *op. cit.*, pp. 57, 95–96; ch. xiii, *supra*.

[72] Lodge, *Works of Hamilton*, IX, 458 fn.

Hamilton apparently was in almost daily contact with his friends in the Senate, who looked to him as a sort of absentee floor leader. "Everything, even to the naming of a committee, is prearranged by Hamilton and his group of speculators," the censorious Maclay confided to his diary. The Pennsylvania Senator often referred to the Secretary's "tools," "gladiators," or "crew." [73] Jefferson in his *Anas* described a conversation between Hamilton and Senator Gunn of Georgia, during which the latter had questioned Senator King's opposition to a certain bill. Jefferson considered Hamilton's reported reply very revealing with respect to the latter's power in the Senate: "Why, I'll tell you as to that Colonel Gunn, that it was never intended that bill should pass." [74]

The position of these Senators should not, however, be understood in terms of subordination to the Secretary of the Treasury. They were rather friends and associates who shared the Secretary's general aims and cooperated with him in their accomplishment. They sometimes differed with Hamilton on questions of detail. Ellsworth, for instance, did not see eye to eye with the Secretary on the details of assumption.[75] King, on more than one occasion, remonstrated with Hamilton when he believed the latter was on the wrong tack.[76]

During the highly critical debate on assumption, Senator Robert Morris took a leading role, pressing strongly for funding the entire debt at 6-percent interest. However, Beard exaggerated Morris' position when he stated that the Pennsylvania financier was "chief legislative manager for Hamilton in Congress." [77]

Rufus King

Although Ellsworth was more active and assumed more responsibility in purely Senate affairs, Rufus King, in the long run, proved most influential in the larger aspects of Hamiltonian politics.

Only 34 years old in 1789, he came to the Senate with a record of solid achievement. A graduate of Harvard's class of 1777, he served briefly as aid to Gen. John Sullivan, studied law, and in a short time rose to high rank on the Massachusetts bar. After constructive service in the State legislature, he was elected to the Congress of the Confederation, where he was one of the drafters of the famous Northwest Ordinance of 1787. He served ably and eloquently in the Constitutional Convention, and in the Massachusetts ratifying convention pleaded with logic and fervor for ratification. Moving to New York, he was almost immediately elected to the legislature, which body, under pressure from Hamilton, chose him and Gen. Philip Schuyler to be New York's first Senators.

Although an impasse between the upper and lower Houses delayed the legislature's choice of Senators until far into the summer of 1789 and prevented King from taking his seat on the inauguration of the new Government, the young New York Senator soon made up for lost time by his ability and energy. He was consistently among the most active Senators in committee work. He was personally closer to Hamilton than any other Senator.[78] Both Hamilton and King were active in New York State politics. King in 1791 was elected one of the 25 directors of the Bank of the United States, and as such conducted a running correspondence with Hamilton regarding the bank's business, especially personnel appointments.[79] In 1793, when Congress was in recess, Hamilton urgently requested the New York Senator to spend a month in the Capital to help meet a crisis in the bank's operations.[80]

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[73] Maclay, *op. cit.*, pp. 208, 311, and *passim*.

[74] Entry dated Dec. 25, 1791, Lipscomb, *op. cit.*, I, 285.

[75] William Garrott Brown, *op. cit.*, pp. 203–204.

[76] See, for example, memorandum King to Strong, King, *op. cit.*, I, 385.

[77] Charles A. Beard, *Economic Origins of Jeffersonian Democracy* (New York: Macmillan Co., 1915), pp. 55, 185–187.

King took a deep interest in foreign relations. He strongly supported Washington's neutrality policy, advised Hamilton on its legal aspects, and defended it in the press. He worked closely with Hamilton and Jay in opposition to pro-French activities in the United States, particularly the Genet mission, King and Jay so arousing the wrath of the undiplomatic diplomat that the latter sought to have them prosecuted for libel.[81] John Beckley, Clerk of the House, at one time told Jefferson he had seen a letter from Sir Gregory Page Turner, Member of Parliament close to the British Ministry, which remarked that Hamilton, King, and Representative William Smith of South Carolina headed the "British interest" in the United States.[82] On the other hand, on one occasion King took the initiative to visit George Hammond, the British Minister, to protest British interference with American commerce on the high seas. Although the meeting was friendly, King was firm in his defense of American rights.[83] In 1793 there was some talk of King being given the State Department portfolio if Jefferson resigned.[84]

In his support of Hamilton, King worked closely with other influential Senators. The intimate nature of their collaboration is revealed by a letter Hamilton wrote King on the progress of suppression of the Whiskey Rebellion, which letter was addressed "* * * in his [King's] absence to be opened by Oliver Ellsworth or George Cabot."[85] He was also on good terms with John Adams. However, there seems to have been an alienation between King and President Washington (for which John C. Hamilton blamed Jefferson), which deterred King from applying directly to the President when he sought appointment as Minister to Great Britain.[86] On this occasion Hamilton contributed a very handsome recommendation of the New York Senator. King, wrote the Secretary, was—

> a remarkably well-informed man, a very judicious one, a man of address, a man of fortune and economy * * * of unimpeached probity * * * a firm friend of the government, a supporter of the measures of the President * * *.[87]

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[78] A possible exception was Philip Schuyler, Hamilton's father-in-law. Schuyler, however, was less active in the Senate and was, moreover, defeated for reelection in 1791.

[79] King, *op. cit.*, I, *passim*.

[80] Letter, Hamilton to King, May 2, 1793, Lodge, *Works of Hamilton*, X, 40. King resigned his directorship when called upon as Senator to vote on legislation affecting the bank. See King, *op. cit.*, I, 397.

[81] Letter, King to Hamilton, Apr. 24, 1793, King, *op. cit.*, I, 439–440. See also *ibid.*, I, 441ff and 455–477.

[82] Entry dated June 7, 1793, Jefferson's *Anas*, Lipscomb, *op. cit.*, IX, 354.

[83] King note dated Apr. 7, 1793, King, *op. cit.*, I, 523–525.

[84] Letter, Madison to Jefferson, Sept. 2, 1793, Hunt, *Writings of Madison*, VI, 194–195.

[85] Letter, Hamilton to King, Oct. 30, 1794, King, *op. cit.*, I, 575.

[86] John C. Hamilton, *History of the Republic*, V. 440; letter King to Hamilton, May 2, 1796, King, *op. cit.*, II, 47.

[87] Washington had stated that *in his own mind* there was no question of King's fitness but that the Senator would be subject to criticism because of "what has been said of his political sentiments with respect to another form of government." Hamilton met this objection by pointing out that the same difficulty "will apply to every man fit for the mission by his conspicuousness, talents, and dispositions." See letter Washington to Hamilton, May 16, 1796, John C. Hamilton, *Works of Hamilton*, VI, 122; letter Hamilton to Washington, May 20, 1796, *ibid.*, VI, 125–126. King received the appointment.

THE JAY MISSION

The close collaboration between Hamilton and his friends in the Senate is well demonstrated by the upper Chamber's action on the Secretary's report on a national bank. Immediately after that report was received from the hands of the Clerk of the House, the Senators elected a committee composed of Caleb Strong, Robert Morris, Philip Schuyler, Pierce Butler, and Oliver Ellsworth to report a bill on the subject. Just 8 days later the committee came back with a bank bill and in less than 3 weeks more the bill had passed the Senate.[88]

This close cooperation reached a climax in 1794 in the events leading up to Jay's mission to England.

The Republicans were pressing for retaliation against British seizures of American ships through legislation which the Federalists believed could only result in war, which in turn would mean the destruction of the entire fabric of Hamilton's financial system. At this juncture Senators Cabot, Ellsworth, and Strong met in King's room to chart a course of action to urge on the President. Later Senator Robert Morris was added to the group. The upshot was that Ellsworth was sent to the President to urge the nomination of Hamilton as special envoy to the Court of St. James, the Secretary possessing in greatest measure the necessary talents, confidence of "the friends of Peace" (i.e. the Federalists), and goodwill of the British. Reserved at first, Washington warmed to the idea of a special mission, but objected to the choice of Hamilton because he "did not possess the confidence of the Country." The question hung fire for about a month, during which time the Republicans, including Senator James Monroe, fought Hamilton's appointment tooth and nail, many of them opposing the whole project of a special mission. Finally, the junta of Federalist Senators, working with Hamilton, agreed to support Chief Justice John Jay, a decision which accorded with the President's own desires.

Hamilton, Ellsworth, Cabot, and King met with Jay after his appointment to discuss the Senate's role in the expected treaty and the proper stand for Jay to take in the negotiations. Jay asked King to accompany him to London, but "domestic objections" plus the Federalists' need of his services in the upper Chamber during the current crisis induced the Senator to decline.[89]

While in London, Jay wrote King a number of letters regarding progress of his negotiations. After the envoy's return, amid the thunderous uproar attending the Senate's 20-to-10 approval of his unpopular handiwork, Hamilton—now in private life—cooperated with his Senate friends in promoting popular support for the treaty, King and Jay assisting him in producing the powerful *Camillus* papers.[90]

All in all, the success of the critical Jay Treaty project was a notable demonstration of the leadership provided by Hamilton in cooperation with his friends in the Senate.

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[88] *Senate Journal*, 1st Cong., 3d sess., Dec. 23, 1790, p. 19; Jan. 18, 1791, pp. 34–35.

[89] King memorandums dated Mar. 10 and 12, 1794, and Apr. 8, 1794, King, *op. cit.*, I, 517–523; letter Jay to King, Apr. 29, 1794, *ibid.*, I, 565–566.

[90] Letter John Adams to wife, Jan. 31, 1796, Adams *Works*, I, 485.

THE SENATE AND HAMILTON'S REPORTS

The House of Representatives was the principal battleground in the controversy over the role of the Secretary of the Treasury in preparing recommendations for congressional action. As has been noted, the act establishing the Treasury Department made it the "duty" of the Secretary to digest and prepare plans to improve the revenue and support the public credit. Pursuant to this authority, the House submitted the requests which inspired Hamilton's more famous reports.

Hamilton wished to submit his reports in person after the manner of Great Britain's Chancellor of the Exchequer, but even some Members friendly to the Secretary believed this was going too far, and permission to do so was denied. However, Hamilton's friends in the House believed that a great principle in administration of Government had been settled in the adoption of the practice of looking to the Secretary to prepare for the consideration of Congress "systematic arrangements in the intricate business of finance" (to use Representative Theodore Sedgwick's phrase).[91] Hamilton's opponents, on the other hand, never tired of ridiculing the alleged inference that the House lacked wisdom to prepare such plans itself and repeatedly tried to defeat motions to refer questions to the Secretary for recommendation. Such a course, said they, gave the Secretary more power than the Senate in originating bills because the upper Chamber's plans "do not come accompanied with the improper influence of lengthy argument." [92]

From time to time, the upper Chamber also requested of, and received from, Hamilton information presumably helpful in the legislative process. In 1791, for instance, the Senate "ordered" the Secretary to lay before it a statement regarding exports for 1 year, including the nature of the articles, their value, and the country of destination.[93] However, since it was in the House (which body took very seriously its constitutional duty regarding revenue legislation) that the requests for the major reports were proposed, and since it was in that Chamber that Hamilton faced the larger and more vociferous opposition, the Senators generally watched from the sidelines the bitter debate regarding the role of executive officers in originating legislation.

Jefferson wrote Madison in 1794 that Hamilton had prepared a certain "counter-report" which some of his "humble servants in the Senate" planned to elicit from him by a motion calling for information. According to Jefferson, they later changed their minds, believing that the report would have better effect if "fired off" in the lower House.[94]

The calls for information designed to educe from Hamilton recommendations regarding major policies such as assumption, funding the national debt, and establishment of the Bank of the United States were, of course, welcomed—in fact, eagerly sought—by the Secretary. However, Hamilton was the object of another type of demand for information which was far less welcome—the order designed to harass. It was principally from the House, also, that Hamilton faced this second type of demand, which reached its climax in the famous Giles Resolutions. The House not only had a stronger anti-Hamilton faction, but also—with its open sessions, reported by the press—provided a more effective forum for the Secretary's critics. Nevertheless, resolutions were offered in the Senate which more or less paralleled the first, less pointed, Giles resolves. On January 15, 1793—8 days before Giles offered his first resolution—Senators Pierce Butler of South Carolina and Stephen R. Bradley of Vermont, both independents veering toward the opposition, moved that the Secretary of the Treasury be called upon for certain detailed information regarding the account of the Government with the Bank of the United States as well as data regarding the public debt. Hamilton's friends allowed the motion to pass and 3 days later the Secretary's report was presented to the Senate. Later three other motions were offered by unnamed Senators calling on the Secretary to lay before the Senate additional information about his conduct of the public finances, apparently based on a supposition that the Secretary had acted improperly.

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[91] *Annals*, 2d Cong., 1st sess., Mar. 8, 1792, p. 437.
[92] *Ibid.*, 2d Cong., 2d sess., Nov. 20, 1792, pp. 704–705.
[93] *Senate Journal*, 1st Cong., 3d sess., Feb. 16, 1791, p. 100.
[94] Letter, Jefferson to Madison, Apr. 3, 1794, Lipscomb, *op. cit.*, IX, 281.

The Senate adopted one of these motions after softening it by addition of the words "as far as the same can at present be done." It then adopted another motion "requesting" that the President (rather than "demanding" that the Secretary) lay before the Senate a statement of the powers under which the Secretary negotiated loans as well as information concerning certain communications from the Commissioners in Holland.[95]

Since the Senate at this time met behind closed doors, the debates accompanying these actions were not recorded and it is impossible to establish definitely the motives behind the Senate's decision to call for this information. However, it seems likely that the motions were originally introduced by the Secretary's opponents to harass or embarrass him, and the Senate's pro-Hamilton majority, not wishing to put itself in the position of quashing legitimate requests for data, softened their tone and then submitted the requests indicated, confident that the Secretary could prepare replies effectively vindicating his conduct. At any rate, the Senate majority, upon receiving the Secretary's reply on February 14, considered it worthy of being printed "for the use of the Senate."[96]

During the first session of the Third Congress the upper Chamber adopted another motion "requesting" the Secretary of the Treasury to furnish certain very detailed information regarding the public debt and the receipts and expenditures of the Federal Government from 1789 through 1793. Again the *Senate Journal* did not give the motives behind the action of the Senate—which during this session had only a very slim Federalist majority.

This session provided an amusing sidelight with respect to the upper Chamber's relations with the Secretary of the Treasury. The Senate had referred to the Secretary a claim by a certain John Hughes for compensation for services as forage master. In reply, Hamilton went to great pains to show why his Department had not acted on Hughes' petition. The Secretary then threw down the gauntlet to the Senate: Did the Senate's communication "imply a supposition that there has been undue delay or negligence on the part of the Secretary of the Treasury? If it does, the supposition is unmerited * * *." The regular duties of the Secretary's Office were sufficient to occupy the full-time energies of one man. The burden was increased by reference to him of numerous private claims arising from the late war and further complicated by "unexpected, desultory, and distressing calls for lengthy and complicated statements," some of which were *bona fide* appeals for information but more often were either too trivial to demand "a laborious, critical, and suspicious investigation," or could have been satisfied by material already in the possession of Congress.

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[95] *Senate Journal*, 2d Cong., 2d sess., Jan. 15, 1793, pp. 33–34; Jan. 18, 1793, pp. 34–35; Jan. 21, 1793, p. 36; Jan. 23, 1793, pp. 37–38.

[96] *Ibid.*, 2d Cong., 2d sess., Feb. 14, 1793, p. 58.

Hamilton then went on at length to lecture the Senators, like so many schoolboys, about how the yellow-fever epidemic in Philadelphia and the critical nature of the Nation's position on the world scene had made it absolutely necessary to defer action on matters of merely individual interest. Might not an official of Hamilton's known energy and industry "have hoped to escape censure, expressed or implied, on that score?"[97]

Certainly Hamilton, in adopting such a tone of aggrieved innocence, was conscious that he was addressing a Chamber headed by a number of close personal friends and associates, who would interpret the letter not as a reflection on them but on the Republican minority.

Worn by his herculean efforts in preparing the reports demanded by the Giles resolutions, Hamilton had some justification for his irritation. When the Senate added to the burden imposed on him by the House by referring to him sundry petitions, it could hardly have been surprising that the Secretary inquired if it might not be expedient to give the task of reporting on petitions to some other agency.[98]

End of an Era

On February 2, 1795, Hamilton closed his stormy career as Secretary of the Treasury. Just a few days before, "agreeably to the order of the Senate," he had sent to the upper Chamber, which had supported his policies through thick and thin, a parting bequest—a plan for the ultimate extinction of the public debt, a report which Henry Cabot Lodge called one of the greatest of Hamilton's state papers.[99]

During the 16 months following Hamilton's resignation, a great change came over the Senate. One by one, all five of his stanchest supporters said goodby to their colleagues in the upstairs Chamber. On March 3, 1795, the Senate lost the amiable spirit of Robert Morris. Heavily involved in the speculations which were about to prove his ruin, he declined reelection. The following March the indefatigable Oliver Ellsworth resigned to accept the post of Chief Justice of the United States Supreme Court. In May of that year Rufus King, tired of "drudging in the Senate," resigned to become Minister to Great Britain. The following month both Massachusetts Senators, Caleb Strong and George Cabot, resigned.

The great measures placing the new Government on a solid footing had all been passed. In August, 1795, President Washington finally signed the Jay Treaty, which assured an uninterrupted trade with Great Britain and a steady flow of tariff revenue into the Treasury to finance Hamilton's fiscal projects. King no doubt expressed the opinion of his colleagues when he remarked that "the work now before us being finished, I think I am entitled to a dismission." [1]

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[97] Letter, Hamilton to the Senate, Feb. 22, 1794, Lodge, *Works of Hamilton*, X, 60–63.
[98] *Annals*, 3d Cong., 1st sess., Mar. 3, 1794, p. 475.
[99] Lodge, *Works of Hamilton*, II, 199–301.

The more constructive part of their party's program having been adopted, these leaders were replaced by men of a more strictly partisan cast of mind. It was the fate of the Senate's leadership now to be identified very thoroughly with the negative, defensive—and dying—years of the Federalist Party.

Years later Adams wrote very bitterly about the loss to the Senate of the most capable Federalist leaders just before he assumed the Presidency:

> Ellsworth, the firmest pillar of his [Washington's] whole administration in the Senate, he had promoted to the high office of Chief Justice of the United States; King he had sent as ambassador to London; Strong was pleased to resign, as well as Cabot * * *. The utmost efforts of Ellsworth, King, and Strong in the Senate had scarcely been sufficient to hold the head of Washington's administration above water during the whole of his eight years.[2]

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[1] Letter, King to Hamilton, May 2, 1796, King, *op. cit.*, II, 47.

[2] Letter, Adams to James Lloyd, January (no day) 1815, Adams *Works*, X, 231-232.

CHAPTER XVI

THE FOCUS OF FEDERALISM

The Pre-Party Period

In recounting the history of political parties, much confusion has resulted from differences of opinion as to just what the term "political party" means. Some observers have used the term to describe merely political orientation. To others the expression has meant a faction in a legislative body with greater or lesser voting cohesion. Still others have insisted that a political party must include not only legislative leaders and some type of platform, but also an organization among the electorate.

In discussing the Federalist Party during the period in question, the term must be restricted to the first two definitions. A dichotomy of political orientation existed from the beginning of the new Government. Factions on the congressional level appeared on the scene to fight or defend Hamilton's financial measures. The Republicans gradually built up a political party organized from the local level up to the national scene—an organization which paid handsome dividends in the election of Jefferson in 1801. But the Federalists never conceived of themselves as a political party in that sense during this period—because their philosophy ruled out such an institution. In some areas, particularly Massachusetts, they established local committees, appointed and controlled from above, but they kept these local groups secret since they continually reproached their Republican opponents for "extra-legal" political organization, which they considered a usurper of the powers of the legally chosen authorities.[1] If the term "Federalist Party" is interpreted to mean, at most, an informal grouping of leaders sharing a common political philosophy and working for a common program, it will be unnecessary to fix a certain time when the party was "founded."[2]

The basic ingredient of Federalism was the leadership—a leadership that would not ignore the electorate entirely, but would inaugurate the Government's program and then at intervals present its record to the country for approval or disapproval. The Federalists believed that men of wealth, talent, and "respectability" ought to rule, leading to the charge that they favored an "aristocracy." They believed in a "high toned" Government—that public officials should be honored with long terms, liberal salaries, and the respect of the populace. They emphasized the interests of the financial, commercial, and shipping elements, and were therefore concentrated chiefly in the areas, especially in New England, were these elements were dominant. During the 1790's, when the central government was in their control and promoted the interests of these economic groups, they favored a strong central government at the expense of State particularism. They supported England and its conservative institutions against the sansculottism and irreligion of the French Revolution.

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[1] Wilfred E. Binkley, *American Political Parties* (New York: Alfred A. Knopf, 1944), pp. 49–50. See also Edgar E. Robinson, *Evolution of American Political Parties* (New York: Harcourt, Brace & Co., 1924), pp. 73–76.

[2] Historians have disagreed rather radically on the subject. Charles Beard in *Economic Origins of Jeffersonian Democracy* claimed there was a close connection between the division over ratification of the Constitution and the Federalist and Republican Parties. John Spencer Bassett in *The Federalist System* ("American Nation" series, vol. XI [New York: Harper & Bros., 1906]), ch. III, claimed that parties were fairly well defined by 1791, but were different from those of 1787–88. Orin G. Libby in "Political Factions in Washington's Administrations," *University of North Dakota Quarterly Journal*, III (July 1913), 293–318, claimed there were only shifting and uncertain groupings before passage of the Alien and Sedition Acts in 1798. Among others, Harry Marlin Tinkcom in *Republicans and Federalists in Pennsylvania, 1790–1801* (Harrisburg: Pennsylvania Historical and Museum Commission, 1950), p. 153, claimed that parties were crystallized in the struggle over the Jay Treaty.

Notwithstanding Madison's observation in the *Federalist*, No. 10, that the causes of faction are shown in the natures of men, some of the Members of the new Congress which attained its first quorum in April 1789, expected that each Member would speak and vote strictly as an individual, acting in concert with no political group. Senator Maclay was so enamoured of this idea that he suspected that any knot of Senators gathered in a corner of the Chamber before a session were guilty of wickedly contriving a "cabal." Indeed, in the first few weeks there *was* little preconcerted action. Senator Wingate commented favorably on the harmony among the Members of each House and observed that any suggestion of sectional jealousy was disapproved by the prudent and moderate and pushed out of sight. From the House, Fisher Ames reported that there was—

> **less party spirit, less of the acrimony of pride when disappointed of success, less personality, less intrigue, cabal, management, or cunning than I ever saw in a public assembly * * *. Measures are so far from being the product of caucusing and cabal, that they are not sufficiently preconcerted.[3]**

However, a month later Senator Pierce Butler of South Carolina complained bitterly of men—

> **scrambling for partial advantages, State interests, and in short, a trail of those narrow, impolitic measures that must, after a while, shake the Union to its very foundations.[4]**

The idyllic congressional life described by Ames could not last, even through the very first session, but the first groupings were temporary and tentative. Thus one finds Senator Richard Henry Lee of Virginia, later a vigorous opponent of the financial aspects of the Federalist credo, supporting a title of dignity for the President and a pay differential between the Senate and the House. The individual Senator's stand on the first tariff bill was based almost entirely on his State's economic interest. The controversy over location of the National Capital, which took so much of the Senate's time during the first two sessions, involved State pride, local and sectional advantage, available facilities, and geographic convenience.

The recorded votes of the 1789 session had a distinct sectional cast. Almost invariably the Senators from south of the Potomac voted together. They generally eyed their northern brethren rather warily, and the northerners returned the compliment. The burden of Senator

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[3] **Letter, Ames to George Richards Minot, July 8, 1789, Ames, *op. cit.*, I, 61–62. See also letter, Wingate to Jeremiah Belknap, July 6, 1789, Wingate, *op. cit.* II, 316.**

[4] **Letter, Butler to James Iredell, Aug. 11, 1789, McRee, *op. cit.*, II, 264–265.**

Butler's letter referred to above was that the South was being outvoted and he hoped North Carolina would soon join the Union to redress the balance. It should not be assumed, however, that this "southern bloc" was a vehicle of opposition to the administration—since there was as yet no program that could be described as administration policy. When Federalism crystallized into a legislative program, some of these southern Senators were often found on the Federalist side.[5]

On the other hand, there appeared in the Senate in 1789 a number of signposts pointing to the later dichotomy between Federalist and Republican. There was, first of all, the Senate's preoccupation with a title for the President which would enhance the "splendor" of the Government. There was the Senate's emphasis on protocol, especially in communications between the two Houses. Possibly most significant was Senate action on proposed constitutional amendments. The upper Chamber weakened several of the House-sponsored Federal safeguards to civil liberties. It then proceeded to defeat several amendments offered from the Senate floor by a small group wishing to give fuller constitutional sanction to the natural-rights philosophy of the Declaration of Independence.[6] In sponsoring these proposals the Virginia Senators, Grayson and Lee, took a prominent part. Most of the amendments were defeated without record votes, but the votes that were recorded indicated strongest support from the South, the area where the Republicans showed their earliest strength.

With the presentation of Hamilton's financial measures, feelings grew warmer. The temperature of the archdemocratic, agrarian-minded Maclay rose to fever heat as he observed the activities of speculators without and Hamilton's "gladiators" (some of them speculators) within the Chamber.

The struggle in the lower House has received the most notice, not only because the debates there were open to the public, but because it was there that Madison offered his plan of discriminating between the original and current holders of Government certificates and it was with respect to the House vote that Hamilton and Jefferson made their famous bargain affecting assumption and location of the National Capital.

But the Senate was far from unaffected by the passions of the struggle. Even if one makes allowance for Maclay's cholera, one can hardly read the pages of his journal without recognizing the intensity of feeling on both sides. Describing the concern of Hamilton's Senate cohort over the prospect of defeat of assumption in the House, he remarked that:

> Ellsworth and Izard in particular walked almost all morning back and forward. Strong and Patterson seemed moved, but not so much agitated. King looked like a boy that had been whipped, and General Schuyler's hair stood on end as if the Indians had fired on him.[7]

The agitation was apparent again when Hamilton's friends—this time in short order—pushed through the bill establishing the Bank of the United States. Critics of the bank plan tried to add a series of hostile amendments, but were never able to muster more than nine votes. Hamilton had passed the word through his father-in-law, Senator Schuyler, that the bill was not to be amended.[8]

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[5] *Senate Journal*, 1st Cong., 1st sess., *passim*; Maclay, *op. cit.*, *passim*; letter, Paine Wingate to President Pickering of New Hampshire, Apr. 27, 1789, Wingate, *op. cit.*, II, 299.

[6] *Senate Journal*, 1st Cong., 1st sess., Sept. 3 to 9, 1789, pp. 116–131.

[7] Maclay, *op. cit.*, p. 228.

During his 2-year stint in the Senate, Maclay was the upper Chamber's most bitter and inveterate opponent of every tenet of what became the Federalist creed. However, he was too self-centered, suspicious, irascible, and beset by feelings of inferiority to attract followers, and he remained something of a lone wolf in the Senate. Of a different stamp was the youthful James Monroe, who began his Senate service in November 1790. He was a close friend and confidant of both Madison and Jefferson, and as a zealous partisan who believed that to be passive in the struggle against Hamiltonian "monarchism" was to be on the wrong side, he constantly sought to enlist his friends in new avenues of anti-Hamilton activity. However, although brilliant and promising, he had an unfortunate tendency to waive propriety and logical processes in his eagerness to accomplish his objectives, and therefore was much less effective than the careful, scholarly Madison, who led the anti-Hamilton forces in this early period.[9]

Yet—in spite of the sound and fury of the Senate's struggle over Hamilton's fiscal program—the Republican-Federalist battlelines in the upper Chamber had not yet been stabilized. This is quite apparent when one analyzes the votes against assumption and in favor of crippling amendments to the bank bill.

Fourteen Senators voted in favor of assumption. Most of these men were and remained of solid Federalist persuasion. However, within 2 or 3 years, two of them—John Langdon and Pierce Butler—joined the Republican camp. A third—Maryland's Charles Carroll of Carrollton, one of the wealthiest men in America—might at this time be termed an independent Federalist, voting to circumscribe the Bank of the United States, opposing titles and ceremony, and leavening his Federalism with greater faith in the people.[10]

Of the 12 Senators who opposed assumption, less than half became identified with the Republican cause. Paine Wingate, brother-in-law of Timothy Pickering, was a Federalist of independent judgment who often voted against Federalist measures for reasons of Yankee thrift or State interest.[11] Timothy Foster was elected as a member of the "Law and Order" party of Rhode Island and in the Senate voted quite consistently with the Federalists. Richard Bassett was a leader of the Federalists of Delaware and was father-in-law of two other sturdy Federalists, Joshua Clayton and James A. Bayard. Benjamin Hawkins and Samuel Johnston were moderate North Carolina Federalists who suffered many indignities at the hands of the radicals in the legislature. James Gunn of Georgia was and remained an independent. His colleague, William Few, usually voted against Federalist measures, but was not an active partisan.

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[8] *Senate Journal*, 1st Cong., 3d sess., Feb. 25, 1791, p. 137; Maclay, *op. cit.*, pp. 370, 401.

[9] These are the conclusions of Donald A. MacPhee's well-documented "The Beginnings of the Republican Party, 1790–1793," (Unpublished M. A. thesis, Department of History, University of California, 1952). For Monroe's Senate activities, see W. P. Cresson, *James Monroe* (Chapel Hill: University of North Carolina Press, 1946), pp. 115 f, and letters Monroe to Jefferson and Madison, Stanislaus Murray Hamilton, *Writings of Monroe*, I, 223–254. John Taylor of Caroline, who served in the Senate from October 1792 to May 1794, was far more influential as a theorist and pamphleteer than as a Senator.

[10] Ellen Hart Smith, *Charles Carroll of Carrollton* (Cambridge: Harvard University Press, 1942), pp. 242–243.

[11] Wingate, *op. cit.*, 369, and *passim*.

Referring to the bill establishing the Bank of the United States, a key vote was on an amendment providing that nothing in the bill should restrain Congress from repealing the measure and the bank charter any time after March 4, 1802. This move was defeated 17 to 9.[12] Three proponents of assumption—Carroll of Maryland and Butler and Izard of South Carolina—voted for this hostile amendment to the bank bill. Among others voting for this amendment were Gunn, Hawkins, and Johnston, none of whom became identified with the Republican Party. In fact, among the nine supporters of the amendment, only the Virginia Senators, Lee and Monroe, were all-out opponents of the Hamilton program, to be joined later by Butler. Even more significant was the fact that the fervently anti-Hamilton Maclay voted against the amendment. This was an almost 100 percent sectional vote, all the "yeas" coming from south of the Mason-Dixon line and all of the "nays" except that of Henry of Maryland coming from north of that line.

When one observes the votes on these two salient items of the Hamilton program, he cannot help but conclude that that program in itself did not divide the Federalist sheep from the Republican goats and that party alinements in the Senate were still in a state of flux in 1791.

However, this fluid state did not last long. The fervid heat generated during the next 2 years gradually hardened party lines. A week after the opening of the Second Congress, the first issue of Philip Freneau's *National Gazette* appeared. Encouraged and supported by Jefferson and his friends, Freneau opened a frenzied verbal combat with John Fenno of the *Gazette of the United States*, the latter backed by Hamilton and associates like Senator Rufus King and serving as official printer to the Senate and other Federal agencies.[13] The newspaper war was matched by equally vicious pamphlet engagements—fought over Hamilton's financial schemes, policies toward Great Britain and France, departmental prerogatives, States' rights, excise taxes, and personalities.

With the execution of Louis XVI in January 1793, the French declaration of war against Britain 11 days later, and inauguration of the Reign of Terror, the French Revolution entered a new phase, which more than any other issue divided Americans into two hostile camps. England's cause was upheld by the elements which had their greatest strength in the Senate. The Republicans, showing increasing strength in the House, fervently supported the cause of the Revolution, backed by a proliferation of newly organized "Democratic Societies" modeled after the Jacobin Club of Paris.

Changes in the Senate reflected the dichotomy in the country at large. The fiery James Jackson replaced the grave and dignified William Few of Georgia. The chameleonic Republican, Alexander Martin, replaced the moderate North Carolina Federalist, Samuel Johnston. The advent of John Taylor of Caroline, brilliant exponent of agrarianism, to take the Senate seat vacated by Richard Henry Lee, brought keen satisfaction to the Republican group.[14] The party's cause in the Senate was further bolstered by the arrival of Republican Senators from newly admitted Kentucky and Vermont, and Langdon and Butler at this time veered toward the Republican camp.

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[12] *Senate Journal*, 1st Cong., 3d sess., Feb. 25, 1791, p. 137.

[13] For an example of Hamilton's and King's support, see letter Hamilton to King, Nov. 11, 1793, King, *op. cit.*, I, 502.

[14] Letter, Madison to Edmund Pendleton, Feb. 23, 1793, Hunt, *Writings of Madison*, VI, 123–124.

On the Federalist side, the astute George Cabot replaced the less influential Tristram Dalton of Massachusetts. Samuel Livermore of New Hampshire was a more consistent Federalist than his predecessor, economy-minded Paine Wingate. However, the net gain lay with the Republicans.

During 1793, the proceedings of the Senate continued to take on a more and more partisan hue. Senators like King, Cabot, and Taylor were in the thick of newspaper and pamphlet warfare. In the upstairs Chamber Republicans tried to harass Hamilton with calls for information and stepped up their campaign to open the Senate doors. A proposed constitutional amendment struck at Senators and House Members who were directors of the Bank of the United States. Senators were either "Jacobins" or "tools of the British crown." It was becoming more and more difficult to be simply a Senator of the United States.

The Senate Champions the Federalist Cause

By 1794 the party conflict headed toward a climax. A pamphlet published in the capital by Senator Taylor stated:

> The existence of two parties in Congress is apparent. The fact is disclosed almost upon every important question. Whether the subject be foreign or domestic—relative to war or peace—navigation or commerce—the magnetism of opposite views draws them wide as the poles assunder.[15]

As the year opened, the Senate was in the midst of a Federalist effort to unseat the "dangerous" Albert Gallatin, on the official premise that he failed to meet the citizenship requirements. The Federalists were successful ("one great object gained," remarked a Federalist friend to Senator King[16]), but the 14-to-12 vote was 100-percent partisan and uncomfortably narrow. Other votes were even closer. A move to withdraw Federal funds from the Bank of the United States was defeated 13 to 12. A bill to enforce American neutrality from violations such as those of Citizen Genet was saved from defeat three times only by the casting vote of Vice President Adams. Six times during the session the Federalists needed his vote.[17] But such showings proved the high-water mark of Republican strength in the Senate until Jefferson's administration. The antiadministration forces failed to storm the last redoubt, and the Senate remained for another 8 years the citadel of Federalism.[18]

In the House of Representatives the situation was considerably different. There the Republicans were now in the majority and elected their candidate, Frederick Augustus Muhlenberg, Speaker over the Federalists' Theodore Sedgwick. The distress of the Federalist leaders was extreme. To them, the very structure of government so laboriously built up during the past 5 years seemed threatened by Republican radicals, brains inflamed by the Reign of Terror and the doctrines of the Jacobins.

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[15] Cited by Woodbury, *op. cit.*, p. 99. See also Dauer, *op. cit.*, p. 72 fn.

[16] Letter, Herman LeRoy to King, Mar. 5, 1794, King, *op. cit.*, I, 548.

[17] *Senate Journal*, 3d Cong., 1st sess., Jan. 16, 1794, p. 35; Mar. 12, 1794, p. 75.

[18] Adams *Works*, I, 457.

Furthermore, British attacks on American commerce had so strengthened the friends of France that Madison, armed with Jefferson's report on American foreign commerce, took the critical step of departing from the Republicans' usual defensive tactics and assumed the offensive. In impassioned House debate, his resolutions calling for discrimination against the goods of nations with which the United States had no commercial treaty (e.g., Great Britain) enjoyed wide support. To make matters worse, some of the support came from the Middle States and New England, whose merchants and shipowners were receiving almost daily reports from the Caribbean of British seizures and brutality. Under the circumstances, even Federalists of both Houses threw their support behind a 30-day general embargo as a means of bringing Great Britain to her senses.[19]

More extreme measures aimed specifically at Great Britain were being drafted. Such action could very well result in war with the world's greatest seapower; at the very least, it would choke off the Federal Government's chief source of revenue, the tariff on imports from Britain, and thus wreck the Hamilton financial structure.

These ominous storm clouds—centering in the lower House where a vigorous Republican leadership was shaping the undisciplined membership to its will—convinced the Senate Federalist chieftains that the whole perilous problem of the Nation's commercial relations must be taken out of the hands of the House and placed under the control of the President and the Senate. Acting on this conviction, Senators Ellsworth, Cabot, Strong, and King held their famous meeting in the latter's room to map the strategy which, with the cooperation of Hamilton, Jay, and Senator Morris, resulted in the Jay mission and subsequent treaty. When the President's nomination of Jay came up for confirmation, they rallied overwhelming support and secured approval by an 18-to-8 vote.[20] Commenting on this strategy, Jefferson wrote to Madison:

> A Bolder party-stroke was never struck. For it certainly is an attempt of a party, which finds they have lost their majority in one branch of the legislature, to make a law by the aid of the other branch and of the executive, under color of a treaty, which shall bind up the hands of the adverse branch from ever restraining the commerce of their patron-nation.[21]

Jefferson's bitterness clouded his objectivity—in seeking to restore friendly relations with Great Britain by means of a treaty, the Senate violated neither the letter nor the spirit of the Constitution. However, his remarks call attention to one significant point—the Federalists were able to use the Senate as their agent in accomplishing their will when it was at the point of being thwarted by dependence on the lower House.[22] At this perilous juncture of the Nation's history the Senate was indeed "the focus of Federalism."

British attacks on American commerce and a report that Lord Dorchester, Governor General of Canada, was inciting the Indians to draw a new western boundary with tomahawk and scalping knife caused such bitter resentment throughout the United States that the Federalists during these ominous days were unable—indeed, unwilling—to follow a pro-British policy. The Federalist-controlled Senate approved the 30-day general embargo bill, which would hit Great Britain hardest but, because it theoretically applied to all nations, could not cause the British offense. The Senate also approved a 1-month extension of that act as well as legislation to bolster the national defense. But the Federalist leaders vigorously fought discriminatory commercial legislation aimed specifically at Great Britain—measures which they feared would so enrage the British as to destroy Jay's chance for fruitful negotiation. Even so, resentment against Britain was so strong in the Senate that when Representative Abraham Clark's nonintercourse resolution, passed by the House 58 to 34, came up for passage, Vice President Adams' casting vote was required to break a 13-to-13 tie and defeat the measure.[23]

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[19] *Annals*, 3d Cong., 1st sess., Mar. 25, 1794 (House), pp. 529–530, Mar. 26, 1794, (Senate), pp. 75–76. These events are well described in John Alexander Carroll and Mary Wells Ashworth, *George Washington* (New York: Charles Scribner's Sons, 1957), ch. vi; Schachner, *op. cit.*, pp. 290–319, and Brant, *James Madison, Father of the Constitution*, ch. xxx.

[20] *Annals*, 3d Cong., 1st sess., Apr. 20, 1794, p. 83.

[21] Letter, Jefferson to Madison, Sept. 21, 1795, Lipscomb, *op. cit.*, IX, 310.

[22] For a lucid discussion of this point, see Charles, *op. cit.*, pp. 97–103.

This failure in the upper Chamber, after victory for an anti-British policy had been almost within their grasp, seemed to cause the Senate Republicans to lose heart completely. Many of them departed from the capital. Toward the close of the session the Republican opposition was so weak that the Federalists needed to muster only 10 to 12 votes to pass their measures.[24] Two weeks before adjournment Madison wrote to Jefferson in utter discouragement. The Republican Party in the Senate was "completely wrecked." He blamed the Federalists' successful use of President Washington's popularity.[25]

During the recess between the first and second sessions of the Third Congress, two antiadministration movements merged and reached a climax. Fed by a passionate infatuation for Republican France and an equally passionate animosity toward all things British, radical Republicans had been organizing "Democratic Societies" whose character and program were the exact antithesis of everything the Federalists stood for. Their blood-hot resolutions expressed fervent attachment to the "liberty, equality, and fraternity" of Revolutionary France, denounced all her European enemies, and execrated the Federalists for their devotion to Great Britain and their allegedly monarchic and aristocratic doctrines. They denounced the President's neutrality proclamation and the Senate-sponsored Jay mission as insults to all liberty-loving Americans.

The other movement reaching a climax during the 1794 recess of Congress was the armed and violent interference with collection of the Federal excise tax in western Pennsylvania known to posterity as the Whiskey Rebellion. In this area the Democratic Societies were particularly strong. Frontier impatience with restraint combined with economic grievances served to unite the westerners against the Federal administration. In this superheated atmosphere, the transition from mere verbal resolutions to violent action was comparatively easy. When the local Federal officials were unable to deal with the situation, President Washington called out an overwhelming force of militia to compel respect for the Federal authorities. Hamilton accompanied the troops and took pains to keep his friends, Senators King, Ellsworth, and Cabot, informed of their progress.[26]

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[23] *Annals*, 3d Cong., 1st sess., Apr. 28, 1794, pp. 89–90.
[24] *Senate Journal*, 3d Cong., 1st. sess., June 4, 1794, to June 9, 1794, pp. 174–200.
[25] Letter, Madison to Jefferson, May 25, 1794, Hunt, *Writings of Madison*, VI, 217.
[26] Letter, Hamilton to King, Oct. 30, 1794, King., *op. cit.*, I. 575.

Painfully aware of the Democratic Societies' constant invective against his administration, of their attacks on him personally (one of their cartoons displayed the President's head under the guillotine), and of their share in creating the atmosphere which resulted in the Whiskey Rebellion, Washington was aroused to strike back at the societies. In November 1794, he devoted almost an entire message to both Houses of Congress to the lessons of the rebellion, which he pointedly blamed on "certain self-created societies." [27]

The Senate's Federalists responded to the cue with alacrity. In 2 days a committee composed of Senators King, Ellsworth, and Izard had ready a reply which echoed the President's anxiety over the "proceedings of certain self-created societies * * * founded in political error, calculated, if not intended, to disorganize our Government." Acting for the Republicans, Senators Aaron Burr and James Jackson moved to eliminate all reference to the clubs, but the Federalists struck down their motion without a record vote. In his acknowledgment of the Senate reply, Washington expressed gratitude for the Senate's support, with particular reference to the societies.[28]

In the House of Representatives, the Federalists were unable to couple condemnation of the whiskey rebels with denunciation of the Democratic Societies. Instead, a carefully worded reply was adopted which handsomely censured the rebels but included no word of approval of the President's stand against the societies.[29]

The significance of these events was not lost on the Nation. The Senate and President were identified in the public mind with Federalist abhorrence of the societies, the House, though by the narrowest of margins, was alined with the Republicans in their defense.[30]

The effect of the struggle over the Jay Treaty on the Senate as an institution has already been discussed at some length.[31] It is necessary at this point merely to emphasize the part that controversy played in intensifying partisan feeling in the Senate and identifying that Chamber with the Federalist Party.

While John Jay was in London, the Republicans kept up a continual fire of opposition to his mission. When the negotiations were completed and a copy of the treaty reached the United States, they immediately denounced it (although having no official word regarding its contents), while condemning Washington for keeping its terms secret.

Pursuant to the call of the President, the Senate on June 8 met in special session to consider the treaty. The Federalist leaders faced the sternest test of their Senate careers.

They were encouraged at the start by the fact that, with the advent of the Fourth Congress—on which the special session raised the curtain—the Federalist forces enjoyed a net gain of one highly critical vote. A stanch Federalist, Elijah Paine, replaced the independent Republican, Stephen R. Bradley. From unlikely Kentucky the vagaries of politics brought the irrepressible Federalist Humphrey Marshall in the place of Republican John Edwards. On the other hand, North Carolina's radical Republican Legislature had joyfully sent Timothy Bloodworth to replace the recalcitrant Federalist Benjamin Hawkins. In view of the two-thirds requirement for ratification of treaties, every Federalist must be induced to remain firm if the treaty was to be approved—no easy task under the best of circumstances but especially difficult in view of the unfavorable terms of the treaty.

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[27] Richardson, *op. cit.*, I, 154–160.

[28] *Ibid.*, I, 160; *Senate Journal*, 3d Cong., 2d sess., Nov. 21, 1794, pp. 14–15; Richardson, *op. cit.*, I, 161.

[29] *Annals*, 3d Cong., 2d sess., Nov. 24 to 28, 1794, pp. 895–947.

[30] For examples of newspaper observations, see *Gazette of the U.S.*, Nov. 27, 1794, and Dec. 17, 1794.

[31] See ch. IX, *supra*.

In the opening days of the session, the Senate Republicans, endeavoring to capitalize on popular resentment against the continued secrecy, called for immediate publication of the treaty and pertinent papers. The vote on this proposal was critical—if the terms had been widely known during the Senate's deliberations, the intense public outcry against ratification might well have caused one wavering Senator to shift from "yea" to "nay" and defeat the treaty. But the Federalist line held firm; in fact, on this vote, one Republican, Alexander Martin—who had rendered such yeoman service in opening the Senate's doors—joined the Federalist majority.[32]

In view of the secrecy of the sessions, all the details of the debate and the full strategy used by the Federalists to obtain ratification have never become known. There can be little question, however, that King, Ellsworth, Cabot, and the other Federalist leaders, their backs to the wall, applied all the resources of argument, eloquence, and party pressure at their command. No doubt their most effective maneuver was the motion to strike out the obnoxious article XII, against which most of the Republican fire had been directed. This tack, recommended by Hamilton, took much of the wind out of the opposition's sails. As previously mentioned, dark tales were circulated at the time to the effect that British gold and other improper influences were used to gain the support of two Senators. However, if the truth of these rumors could have been established, no doubt the Republicans would have exploited them more fully.[33]

In the course of the debate the treaty weathered test after test with majorities indicating that it would probably receive the necessary two-thirds vote on the final ballot. Final approval was carried by a vote of 20 to 10, the exact constitutional requirement.[34]

It is not necessary to look for sinister causes for the treaty's victory in the Senate. The simple fact was that the Federalists enjoyed an overwhelming majority in the Senate and needed only to hold their own lines and pick up the support of two independent-minded Senators to gain the necessary 20 votes. This they did. Probably the only Federalist votes that caused the party leaders any anxiety were those of the southerners, Marshall and Read. These found the magnetic attraction of party stronger than that of sectional prejudice. The two independent votes picked up by the protreaty forces were those of Gunn of Georgia and Henry of Maryland. An analysis of Gunn's votes over four sessions reveal that he voted with the Federalists more often than not, and therefore his protreaty vote could not have been surprising. John Henry was an independent Republican who often voted with the Federalists.[35] In view of Baltimore's importance as a seaport, it was not unnatural for him to join his Maryland colleague in supporting the treaty.[36]

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[32] *Senate Executive Journal,* June 8, 1795, and June 12, 1795, I, 181–182.
[33] See ch. ix, *supra.*
[34] *Senate Executive Journal,* June 15 to 24, 1795, I, 182–186.
[35] Henry voted with the Federalists 35 percent of the time during the following session. See *Senate Journal,* 4th Cong., 1st sess., *passim.*

The Senate's approval of the treaty thoroughly identified the upper Chamber with the Federalist Party. Federalists everywhere vigorously defended the upper House as the savior of their party and Nation; Republicans, with even greater vigor, denounced the body which had ratified this "death warrant of American liberties." King, Cabot, and Ellsworth took leading roles in defending the treaty before the public. King, the most conspicuous of the Senate leaders, was a tower of strength to the protreaty Federalists, helping to organize the defense and joining Hamilton in writing the brilliant *Camillus* letters.[37]

In the "great debate" on the treaty power which opened in March 1796, House Federalists alined themselves solidly in support of the Senate and House Republicans just as thoroughly opposed the upper Chamber. While the final vote on the issue was constitutionally inconclusive, the net result of the debate was further to identify the Senate with the fortunes of the Federalist Party. Jefferson, now universally accepted as leader of the Republicans, was particularly bitter against the Chamber over which he was soon to preside.[38]

During the session in which this full-dress debate on the treaty power took place, Federalists in the Senate showed a high degree of party regularity. Twelve of the nineteen Federalists could boast voting records of 90 percent or more in favor of Federalist measures; 16 could show a party regularity of 80 percent or more.[39] Jefferson believed the Federalists had been welded into this degree of cohesion by the struggle for the Jay Treaty. "Common error, common censure, and common efforts of defense," he wrote, "had formed the treaty majority into a common band, which feared to separate even on other subjects."[40]

The Republican leader was no doubt right in emphasizing the role of the Jay Treaty in uniting the Federalists in a common cause. They fought for the treaty because it supported the whole superstructure of their party's program. Yet it must not be overlooked that development of party loyalty was due, in a larger sense, to the whole violent political temper of the times, which divided men into two groups, daily provided new incidents to drive them further apart, and thus promoted solidarity within the groups for mutual support.

Jefferson ignored the fact that the minority also displayed a firm party line. Six of the eleven Senate Republicans showed a party voting consistency of 90 percent or more; all but Henry of Maryland (who should, perhaps, be listed as an independent) voted with their party more than 80 percent of the time. In view of such a degree of voting regularity by Senators of both parties, and the further fact that a party label could be pinned on all the Senators except Gunn and possibly Henry, it is clear that by 1796 party government had come to stay.[41]

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[36] Lt. Gov. Oliver Wolcott, Sr., of Connecticut, father of Hamilton's successor at the Treasury and a well-informed though partisan observer of the national political scene, wrote his son that the vote on the Jay Treaty was as he expected. He further stated that the "dissentients" were glad the treaty had been approved, and in the manner in which it was done—"with a rub and a go." Rather than see the treaty rejected, he claimed the Republican leaders would have directed Robinson of Vermont or some other minority member to vote for it—apparently to provide the Republicans with a valuable campaign issue. See letter, Wolcott to his son, July 20, 1795, Gibbs, *op. cit.*, I, 215.

[37] King to Christopher Gore, July 24, 1795, King, *op. cit.*, II, 16; Cabot to King, Aug. 4, 1795, *ibid*, II, 20–21; Ellsworth to Wolcott, Aug. 20, 1795, Gibbs, *op. cit.*, I, 226.

[38] Letter, Jefferson to Edward Rutledge, Nov. 30, 1795, Lipscomb, *op. cit.*, IX, 314; Jefferson to Giles, Dec. 31, 1795, *ibid.*, IX, 315.

[39] *Senate Journal*, 4th Cong., 1st sess., *passim*.

[40] Letter, Jefferson to Burr, June 17, 1797, *ibid.*, IX, 400–401.

The Federalists Attenuate the Positive

In spite of this display of party regularity, the old Federalist zeal and fire, which had held the majority together to put across even a highly unpopular treaty, was now lacking. Part of this decline in spirit was doubtless due to the fact that the Senators, together with their countrymen in general, were worn out by nearly 2 years of agitation on the treaty issue. Moreover, in the latter part of the session the Federalists were discouraged by the absence, during critical votes, of three of their number, Frelinghuysen, Paine, and Vining. Most important of all, it was during this session that the Senate said farewell to the three Senators who had done most to give impetus to the Federalist cause during the trying years just passed—Ellsworth, King, and Strong. A few days after the session was over, Cabot also resigned. No replacements arrived during the session to hold the Federalist line. Representative Chauncey Goodrich of Connecticut, despite his awkward metaphor, well expressed the Federalist mood in a letter to the Governor of his strongly Federalist state:

> There is not danger of an anti-Federal Senate, but the loss of tried characters is a misfortune, and when old rats leave a house, it has always been considered as a bad omen. There is now left only a bare majority of good men in the Senate, so many are absent. I believe, however, we shall get along.[42]

The Federalists did, indeed, barely "get along." The outcome of several votes depended on which way independent-minded Senators like Gunn, Marshall, and Henry cast their ballots.

During this first session of the Fourth Congress a series of events occurred which foreshadowed the negative character the Federalist Party was to bear during the span of life left to it.

The first of these events involved the admission to the Union of Tennessee. Knowing that its citizens would be almost certain to vote Republican and further provoked by the strident sansculottism of Senator-elect William Blount, who arrived at the National Capital as a "herald of the rights of man," the Senate majority challenged the right of the "self-created State" to be admitted. For several weeks the Tennesseeans were kept waiting; in fact, the Federalists would have postponed the admission bill until the following session if the Republicans had not obtained the support of Gunn, Marshall, and Livermore.[43] When Blount and his colleague, William Cocke, appeared prematurely to take their seats, the Federalists would have succeeded in denying them permission to attend Senate sessions even as spectators had it not been for the defection of Theodore Foster and Richard Potts.[44] On the last day of the session, when the news arrived that President Washington had signed the admission bill, not a single Federalist voted to extend to Blount and Cocke the simple courtesy of permission to take the oath before adjournment.[45]

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[41] These figures regarding party regularity are based on 33 rollcall votes, as shown in the *Senate Journal* for the first session of the Fourth Congress, on questions involving issues on which the parties apparently took a stand.

Although he voted with the Federalists on only 44 percent of the party votes during this session, Humphrey Marshall of Kentucky is shown as a Federalist because he was so classified by his contemporaries.

[42] Letter, Goodrich to Oliver Wolcott, Sr., May 20, 1796, Gibbs, *op. cit.*, I, 341.

[43] *Senate Journal*, 4th Cong., 1st sess., May 26, 1796, pp. 327–328; letter, C. Goodrich to Oliver Wolcott, Sr., May 13, 1796, Gibbs, *op. cit.*, I, 338.

Before the end of the Fourth Congress, a new phenomenon of American politics—the first real contest for the Presidency—had appeared on the horizon. The event presaged another characteristic of the Federalism of the future—internal division.

John Adams, who had considered himself the "heir-apparent" for 8 long years, was generally considered the logical Federalist candidate. But Hamilton, not Adams, was the real leader of the Federalist Party, and the ex-Secretary had other ideas. His plan was to allow Adams to be the ostensible presidential candidate, select a southerner as his running mate, seek equal support for the latter in the North, and then look to the South to detach enough of its votes from Adams to bring the southerner in as President.[46]

In this effort Hamilton had the cooperation of several of his powerful friends in the Senate. Theodore Sedgwick, for years a Federalist stalwart in the House and now beginning his conspicuous service as a Federalist partisan in the Senate, was a chief lieutenant of Hamilton and concurred in the plan. So did the immensely wealthy Senator William Bingham. Rufus King, just before resigning from the Senate to become Minister to Great Britain, suggested Thomas Pinckney to Hamilton as the southerner who, in view of his highly popular treaty with Spain, would be the strongest candidate.[47]

These maneuvers did not succeed in keeping Adams out of the Presidency, but did make the dreaded "Jacobin," Thomas Jefferson, Vice President of the United States and President of the Federalist-controlled Senate.

In addition to a new President in the Executive Mansion and a Republican in the Vice President's seat, other changes were apparent in the political picture as it affected the Senate when the Fifth Congress convened. Federalists in the Senate (as well as in the House) still looked to Hamilton for legislative leadership. But the personnel of the upper Chamber had greatly changed in the past year or two. All the original leaders were gone. Of the 32 Senators, 11 had seen a single year's service or less; 17 had begun their Senate service since the close of the Third Congress in March 1795. Elected in the heat of party divisions in State legislatures, many of these newer Members were more partisan-minded than their predecessors. This was particularly true of Federalist leaders such as Theodore Sedgwick and Benjamin Goodhue, of Massachusetts, and Uriah Tracy and James Hillhouse, of Connecticut. The outlet for their energies was to be not the constructive measures of the earlier years but a program designed primarily to keep their party in power.

An anomalous political situation existed at the time Adams took office in March 1797. The Republicans toyed briefly with the hope that the friendly relations which had existed between Adams and Jefferson could be utilized to steer the President on a proper Republican course. For his part, Adams expressed regard for Jefferson and hoped that his advancement and his situation in the Senate ("an excellent School"), would disaffect the Vice President from his "French friends" and put him on the right track politically.[48]

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[44] *Senate Journal*, 4th Cong., 1st sess., May 23, 1796, pp. 282–283.

[45] *Ibid.*, June 1, 1796, pp. 344–345.

[46] It will be recalled that before adoption of the 12th amendment in 1804, the candidate receiving the highest number of votes became President and the one receiving the second highest number became Vice President.

[47] Letter, Sedgwick to King, Mar. 12, 1797, King, *op. cit.*, II, 156; letter, Bingham to King, Nov. 29, 1796, *ibid.*, II, 112; letter, King to Hamilton, May 2, 1796, *ibid.*, II, 46. For a discussion of these maneuvers, see Dauer, *op. cit.*, ch. VI.

The hopes of both sides were soon to be shattered. On the other hand, Adams complained that he was isolated from the leaders of his own party in a political world "as silent as the grave" and could only wonder if he would have their support.[49]

In 1809, Adams, describing the opening of his administration 12 years after the event, wrote that Senator Tracy had called upon him shortly after his inauguration and produced a long letter from Hamilton outlining an elaborate "system of instruction" for the President, Senate, and House. According to Adams' account, the new President read it very deliberately and concluded that Hamilton was "in a delirium."[50] Adams was not, indeed, the type of man who would take kindly to such gratuitous advice from the man who had recently tried to defeat him for the Presidency.

Adams' recollection after 12 years may have been faulty. However, since Hamilton had worked out an elaborate plan to govern American relations with France—a plan which he outlined in detail to Pickering and in less detail to Washington, McHenry, and Senator Sedgwick—it is certainly possible that Senator Tracy did submit it to the President.[51]

Nevertheless, when Adams, amid the passions aroused by French spoliations, called Congress into special session in May 1797, and proceeded to recommend firm measures against France as well as fresh attempts at negotiation, Senate and House Federalists were quick to express their approval. In fact, the Federalist-dominated Senate's long reply to the President's message was almost effusive in praise of the latter's conduct. House Republicans, on the other hand, were able to tone down somewhat the anti-French tenor of the lower Chamber's reply.[52] But the Federalists of both Houses welcomed the message as a demonstration of the President's attachment to party principles. Republicans who had high hopes about Adams' "moderation" quickly changed their minds.[53]

During the special session of 1797, the Senate, which at least on paper now had a 2-to-1 Federalist majority, was determined to implement the anti-French recommendations in the President's message. Senator Uriah Tracy, of Connecticut, recently come to the Senate after 3 years of battling the Republicans in the House, was prepared to lead the upper Chamber in sledgehammer tactics to accomplish the party's aims.[54]

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[48] Letter, Adams to T. Dalton, Jan. 19, 1797, cited in Schachner, *op. cit.*, p. 411.

[49] Letter, Adams to his wife, Mar. 17, 1797, C. F. Adams, *Letters of Adams Addressed to His Wife,* II, 252; Adams to his wife, Mar. 9, 1797, *ibid.*, II, 247.

[50] Adams, *Letters to the Boston Patriot,* letter No. XIII, cited in Gibbs, *op. cit.*, I, 483.

[51] Letter, Hamilton to Pickering, Mar. 22, 1797, Lodge, *Works of Hamilton,* X, 243–246; Hamilton to Washington, Jan. 22, 1797, *ibid.*, X, 234; Hamilton to Sedgwick, Feb. 26, 1797, *ibid.*, X, 239; Hamilton to McHenry, Mar. 22, 1797, *ibid.*, X, 241.

[52] Richardson, *op. cit.*, I, 223–234.

[53] The Republicans believed that this was a "war" speech. Actually it was not; Adams hoped the measures he recommended would meet the emergency without war. Neither did Hamilton seek war at this time. He believed that neither public opinion nor the state of the Nation's defenses would admit of such a drastic step. He even prevailed on Tracy, most warlike of the Senators, to await the outcome of the projected further negotiation. See letter, Tracy to Hamilton, Apr. 6, 1797, cited in Schachner, *op. cit.*, p. 421.

Jefferson, leading the Republican forces from his seat on the Senate dais, expressed keen disappointment. He had hoped that the Federalist phalanx formed to pass the Jay Treaty was finally weakening; now the President's "inflammatory" appeal had once more rallied the Federalists to their party standard and the votes in the Senate were again "pretty regular treaty votes on all questions of principle."[55] He deeply regretted the extent of party passions:

> The passions are too high at present to be cooled in our day. You and I have formerly seen warm debates and high political passions. But gentlemen of different politics would then speak to each other, and separate the business of the Senate from that of society. It is not so now. Men who have been intimate all their lives, cross the streets to avoid meeting, and turn their heads another way, less they should be obliged to touch their hats.[56]

Nevertheless, the Senate Federalist leaders were not as successful as they had hoped. In the Chamber itself, absences depleted the party ranks. In the House, the large number of moderate Federalists who held the balance of power refused to approve strong measures. A bill passed by the Senate augmenting the Navy was badly mauled. Senator Sedgwick asserted bitterly that though his party ostensibly enjoyed a slight majority in the House, not one necessary measure was taken. The Federalists could hardly be blamed for feeling discouraged.[57]

Meanwhile the President had appointed, and the Senate confirmed, a three-man commission composed of John Marshall, Charles Cotesworth Pinckney, and Elbridge Gerry to negotiate further with France. Appointment of Gerry, one of the few men in the country close to Adams, was opposed by some in both the Cabinet and the Senate on the ground that the mission ought to be an all-Federalist one. However, he was finally confirmed with the others, with but six negative votes.[58]

THE XYZ SESSION: THE SENATE EXPLOITS ITS OPPORTUNITY

When the time came for Members of the Senate and House to gather in Philadelphia for the second session of the Fifth Congress, the ship of state was becalmed by a mood of uneasy waiting. Although the French depredations continued, it was the general feeling of the country that it was best to mark time until word came as to the success or failure of the special mission to Paris.

In the Senate the Federalists still enjoyed a two-to-one majority, and their lines were becoming more firm. Young Ray Greene replaced the 67-year-old and discontented William Bradford of Rhode Island; stout Federalist James Lloyd took the seat of independent Republican John Henry of Maryland; former Gov. Joshua Clayton of Delaware appeared to give the last months of his life to the

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[54] Letter, Tracy to Oliver Wolcott, Sr., May 27, 1797, Gibbs, *op. cit.*, I, 538–539.

[55] Letter, Jefferson to Burr, June 17, 1797, Lipscomb, *op. cit.*, IX, 400–403.

[56] Letter, Jefferson to Edward Rutledge, June 24, 1797, *ibid.*, IX, 411.

[57] Letter, Sedgwick to King, June 24, 1797, King, *op. cit.*, II, 192. Party alinements in the House in the 4th through the 7th Congs. are carefully analzyed in Dauer, *op. cit.*, app. III, pp. 288–331.

Jefferson attributed the Federalists's setbacks in the special session of 1797 to the general feeling that French successes in Europe would soon terminate the war with a French victory. See letter, Jefferson to Burr, June 17, 1797, Lipscomb, *op. cit.*, IX, 400–403.

[58] Letter, Sedgwick to King, June 24, 1797, King, *op. cit.*, II, 192.

Federalist cause in place of the unreliable John Vining. On the Republican side, 30-year-old Andrew Jackson occupied one of the Tennessee seats for a few months, voted a straight party ballot, and vanished from the national scene. In the House of Representatives the Federalists still enjoyed a small majority, but the balance of power was again wielded by about a dozen moderates of both parties.[59]

In his annual message of November 22, 1797, President Adams announced that the special envoys had arrived in Paris in September, but that the increasing depradations of the French made continuing efforts to build up American defenses indispensably necessary. In its reply, the Senate took its cue from the President and stressed defensive rather than offensive measures. Taking a side glance at the lukewarmly Federalist lower Chamber, the Senators took advantage of the opportunity to appeal, in an oblique way, for House cooperation in a program to undeceive the aggressor who regarded Americans as a weak and divided people.[60]

Within a week after listening to the President's address, the Senate elected a five-man committee to consider the parts of the message dealing with security and protection of American commerce. Four of the committee members were Federalists—Goodhue, Laurance, Tracy, and Bingham—the fifth being the independent James Gunn, unpredictable in his votes but personally friendly to Hamilton and other Federalists.[61]

Appointment of such a committee was not an unusual procedure; the Senate often appointed committees to consider recommendations of the Chief Executive in his annual messages. This particular committee, however, was to attain repute as the most productive Senate committee of the entire Federalist period. Nevertheless, the group did not immediately report legislation to implement the President's recommendations. In fact, month followed month without decisive action by either House. Congress was still stalled on dead center awaiting the outcome of the special Paris mission.

This is not to say that party antagonisms were held in abeyance. On the contrary, party feeling reached a new high in acrimony and bitterness. In February 1798, Senator James Ross of Pennsylvania wrote ex-President Washington:

> The Legislature [Congress] is much divided, and the parties in it, as much embittered against each other, as it is possible to conceive. The more our danger increases, the factious, discontented spirit seems to become bolder * * *. One party or the other must obtain a decisive Victory before the Machine of Government can move with efficacy.[62]

The static party conflict in Congress suddenly assumed direction on March 5, 1798, when President Adams transmitted to Senate and House a short message together with one of the dispatches from the three envoys in Paris. House Republicans, suspecting that the President in his subsequent message of March 19 was withholding information useful to the pro-French forces, demanded that Adams submit to Congress the full text of the envoys' dispatches. When the

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[59] Dauer, *op. cit.*, p. 310.

[60] Richardson, *op. cit.*, I, 240–246.

[61] *Senate Journal*, 5th Cong., 2d sess., Nov. 29, 1797, p. 26; letters, Hamilton to Gunn, Dec. 16 and 22, 1798, Lodge, *Works of Hamilton*, VII, 41–42, 45–47.

[62] Letter, Ross to Washington, Feb. 2, 1798, Fitzpatrick, *Writings of Washington*, XXXVI, 164 fn.

President complied and sent to House and Senate the full story of the shameful treatment accorded the American commissioners by the French Directory, the Federalists in Congress obtained possession of a political bomb capable of blowing the case of the pro-French Republicans to fragments.

Upon learning that the President, far from exaggerating the humiliation heaped on the American envoys, had actually played down the true situation, the House Republicans completely reversed their position and voted to keep the XYZ documents secret. But they could not control the action of the Chamber upstairs. There the Federalist majority, smarting under years of Republican invective and eager to unite the Nation under their leadership in a vigorous anti-French program, released to the country at large the dispatches with their full account of French sordidness, cynicism, and insult. Of particular partisan value were the references to the Directory's belief in the existence of a puppet French party in America.[63]

The effect on the Nation was almost magical. A tidal wave of resentment against the French swept over the Nation—a wave which the Federalists were fully prepared to ride to a new era of power for their party. Addresses calling for strong measures poured in on both Houses "from all bodies and descriptions of men." [64] Even so intransigent a Republican as Stevens T. Mason, of Virginia, found himself in the position of having to transmit such addresses to the Senate.[65]

In the changed situation the Senate as an institution enjoyed a new status in the popular esteem. The Chamber which allegedly had "sold the country down the river" in ratifying the Jay Treaty emerged as the stanch champion of the national honor and interest.

There was no dearth of plans to meet the new situation. The Republicans, putting the best face possible on the American envoys' experience in Paris, wished to give no further grievance to France, but their minimum program of defense now had little appeal. On the other extreme, Hamilton believed that the President ought to take a vigorous stand as leader of the Nation during the emergency. Although the strained relations between the two men prevented Hamilton from approaching the President directly, the former Secretary was in a peculiar position to influence policy through his ready entree into Congress via such associates as Senator Sedgwick and through his influence over three of the four members of the Cabinet. He now wrote to Secretaries Pickering and Wolcott outlining a military, financial, and diplomatic program to meet the new crisis. A letter to Sedgwick recommended that the President make a "solemn and manly communication to Congress" and then outlined what he believed the message ought to contain.[66]

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[63] Robert Troup stated that the Senate vote for publication was two to one. See letter, Troup to King, June 3, 1798, King, *op. cit.*, II, 328–329.

Commenting on the Senate's decision, Sedgwick wrote: "[There were] strong objections against publishing the communication and which would have been conclusive, if withholding the publication, could have prevented its publicity. But the substance was known before the order of the Senate for that purpose. The mischief was, therefore, done, and the only question was, whether we should avail ourselves of the opportunity afforded us of acquiring confidence in the Government and Union among the people. The effects as they respect both these objects will, I believe, be considerable." See letter, Sedgwick to King, Apr. 9, 1798, *ibid.*, II, 311–312.

[64] Letter, Troup to King, June 3, 1798, *loc. cit.*

[65] *Senate Journal*, 5th Cong., 2d sess., May 3 and 11, 1798, pp. 266–267, 279.

The recommendations of both Hamilton and Adams naturally had their weight with the Federalists in the Senate, but actually the latter needed little or no outside prompting to impel them to set in motion a broad legislative program to meet the crisis. They were led by a group of men who can very appropriately be called High Federalists—men who had little faith in the people or in popular government, who looked upon their Republican opponents as dyed-in-the-wool Jacobins, and who regarded the current situation as a heaven-sent opportunity to strike at the French and their American sympathizers.

Theodore Sedgwick, for instance, as a House Member had achieved notoriety 2 years before by referring to popular elections of Members of the lower House as choice by "an ignorant herd" subject to cajoling and deceit practiced in "obscure corners." [67] Senator Jacob Read of South Carolina was quoted by the *Aurora* as favoring deportation not only of dangerous aliens but of citizens also, including Members of the Senate—presumably Republicans.[68] Senator Uriah Tracy of Connecticut believed the pro-French South should be detached from the Union, leaving the Federalists in control of New England and the Middle States.[69] Senator James Lloyd of Maryland was quoted as stating in the Senate that he preferred appointment to Federal office of a man who had been an "inveterate Tory" in the Revolution to an applicant who had lost both arms in the patriot cause but who now opposed the administration.[70] Senator Benjamin Goodhue of Massachusetts introduced in the Senate a constitutional amendment striking at foreign-born citizens (like Gallatin) by making them ineligible to hold seats in Congress.[71] Such men were fully capable of launching out on their own in a crisis such as now confronted the Nation.

Almost immediately after release of the XYZ papers, the heavily-Federalist Goodhue committee, appointed earlier to consider the parts of Adams' annual message dealing with security and protection of American commerce, suddenly sprang to life. Beginning in early April the committee prepared and reported to the Senate bill after bill to meet the crisis—April 13, a bill authorizing acquisition of small vessels for use as galleys; June 1, a bill voiding the treaty with France; July 9, a bill to encourage captures of French armed vessels by American privateers. The Senate also referred to this "grand committee" several House bills dealing with the defense effort and relations with France.[72]

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[66] Letter, Hamilton to Pickering, Mar. 17, 1798, Lodge, *Writings of Hamilton*, X, 275–278; Hamilton to Wolcott, June 5, 1798, *ibid.*, X, 288–290; Hamilton to Sedgwick, March (?) 1798, *ibid.*, X, 278–279.

How Hamilton's letter to Sedgwick was to influence the President is not clear. The President himself, although viewing the situation with extreme gravity, recommended a more moderate program. He wished to place greater reliance on an augmented Navy, Hamilton on a vastly increased Army.

[67] *Annals*, 4th Cong., 1st sess., Mar. 11, 1796, p. 518.

[68] *Aurora*, June 14, 1798.

[69] Letter, Tracy to Hamilton, Apr. 6, 1798, cited by Dauer, *op. cit.*, p. 207, citing Hamilton Papers (Library of Congress), 29/4121.

[70] *Aurora*, Feb. 27, 1798.

[71] *Senate Journal*, 5th Cong., 2d sess., July 7, 1798, pp. 435–436.

[72] *Ibid.*, 5th Cong., 2d sess., Apr. 13, 1798, p. 224; Apr. 25, 1798, p. 248; June 1, 1798, p. 373; June 4, 1798, p. 324; July 3, 1798, p. 419; July 9, 1798, p. 442; July 10, 1798, p. 447.

The most controversial bills of this highly controversial session were suggested by neither Adams nor Hamilton but by high Federalists in the Senate. On April 25, 1798, Senator James Hillhouse of Connecticut called for appointment of a committee to prepare an alien friends bill, a motion which was promptly referred to a sympathetic and solidly Federalist committee of five. On June 26, Gen. James Lloyd, freshman Senator from Maryland, introduced the most acute irritant of all, the peremptory sedition bill, which was referred to five Federalist stalwarts—Lloyd, Tracy, Read, Richard Stockton of New Jersey, and Nathaniel Chipman of Vermont.[73]

President Adams approved the purposes of the alien and sedition legislation and affixed his signature to the bills after they passed Congress. Abigail Adams, no doubt reflecting the thinking of her husband, as early as April 26, complaining of the scurrility of Bache's *Aurora*, remarked that "nothing will have an effect until Congress pass a Sedition Bill, which I presume they will do before they rise." [74] However, there is no evidence that these were "administration bills" in the sense that they were recommended by the President.[75] Nor were these alien and sedition bills conceived in the fertile brain of Alexander Hamilton. Regardless of the extent to which Hamilton approved of this legislation, it is clear from his correspondence that—with respect to the sedition bill at least—he did not even see the draft before its introduction in the Senate. His recommendations to Pickering, Wolcott, and Sedgwick did not include any such measures.[76]

This is not to say that Senators Hillhouse and Lloyd conceived these bills in the ferment of their own minds only. Bills such as these reflected the bitter resentment the Federalists as a party harbored against the poisonous Republican papers and the alien radicals who, among other activities, edited many of them. The point here is that the Senate in sponsoring such legislation played its now traditional role of handmaiden of the Federalist Party.

Both measures passed the Senate by overwhelming majorities, the alien friends bill by 2-to-1 and the sedition bill by a 3-to-1 votes.[77] In each case the bill was pushed through by the Senate's High Federalist steamroller was far more severe than the party's moderates in the House, who held the balance of power, were willing to accept.[78] Provisions in the alien bill prescribing punishment at hard labor and imprisonment for life were mitigated and aliens ordered out of the country were authorized to take their property with them. To secure passage of the sedition bill, Harrison Gray Otis, Robert G. Harper, and James A. Bayard virtually had to rewrite the entire measure, adding a number of important safeguards for the accused and limiting operation of the law to March 3, 1801. Even as so modified, the House came close to defeating both measures, the alien bill passing by a vote of 46 to 40 and the sedition bill by a margin of 44 to 41.[79]

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[73] *Ibid.*, 5th Cong., 2d sess., Apr. 25, 1798, p. 249; Apr. 26, 1798, p. 251; June 26, 1798, p. 388; June 27, 1798, p. 394.

[74] Letter, Abigail Adams to sister, Apr. 26, 1798, Mitchell, *op. cit.*, p. 165.

[75] Adams, *Works*, I, 562; Miller, *op. cit.*, pp. 71–72.

[76] For conflicting opinions regarding Hamilton's attitude toward the Alien and Sedition Acts see John C. Miller's *Crisis in Freedom*, p. 71, and James Morton Smith's less temperate *Freedom's Fetters*, pp. 109, 152–153.

[77] *Annals*, 5th Cong., 2d sess., June 8, 1798, p. 575; July 3, 1798, p. 599.

[78] As originally introduced by Senator Lloyd, the sedition bill made American adherents of France liable for the death penalty for treason. See text of the original draft in Dauer, *op. cit.*, Appendix IV, pp. 343–345.

As continued French aggressions and the XYZ disclosures produced widespread resentment and a unity of national feeling against France, the stoutest of the Federalists believed the time had come for a declaration of war. This sentiment was particularly strong in the Senate. Senator Sedgwick, disgusted with the necessity of trimming the Federalist program to suit the most lukewarm of the House Federalists and eager to "put an end to the cooperation of external and internal enemies," saw in a declaration of war the most effective party maneuver—one that would enable the Federalists to carry all the forthcoming elections.[80] Moreover, with war declared the Government could hang traitors and expel Frenchmen without alien and sedition acts. According to Sedgwick, every Federalist Senator except Bingham favored an immediate declaration.[81]

About July 1 the congressional "war party" held a caucus to determine the feasibility of calling for a declaration of war. The Senate Members were anxious to initiate such a resolution, but learning that there was a strong possibility that the House would reject it, they were forced to abandon the project.[82] In this stand the Senators went beyond that of Hamilton, who still believed the public was not ready for war. How a war could have been prosecuted without the cooperation of the President they did not make clear.

In view of the contrasting actions of Senate and House on these critical measures, no one could escape the conclusion that the Senate was, indeed, the bastion of uncompromising High Federalism. Summarizing the events of the session, a certain "Aristedes" writing in the Federalist *Gazette of the United States* pointed with pride and viewed with alarm:

> The Senate of the United States is entitled, likewise, to your highest confidence. A majority of its members have steadily supported the honor of their country. It is in the House of Representatives that the infamous partizans of France place their hopes of success. And, indeed, the independent American is forced, with shame, to confess that a large proportion of its members have been the tools of a foreign power.[83]

In the *Aurora* of February 19, 1800, William Duane charged that the Federalist program regarding war, navy, army, and Republican proscription was planned at a secret caucus at the palatial Philadelphia home of Senator Bingham attended by 17 Federalist Senators. Prior to its deliberations, the caucus (so said Duane) adopted by a 9-to-8 vote a solemn pledge "to act *firmly* upon the measures to be agreed upon by the majority." According to the alleged plan, this majority of 9 could thus bind all 17, who constituted a majority of the Senate, and thereby carry any measure they desired. Duane claimed that the majority "held the minority to their engagement, and the whole 17 voted in Senate upon all the measures discussed at the *Caucus*."

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[79] *Ibid.*, pp. 163–164; Miller, *op. cit.*, pp. 52, 66–67.

[80] Letter, Sedgwick to King, July 1, 1798, King, *op. cit.*, II, 352.

[81] *Ibid.*, King, II, 352; letter, Sedgwick to King, Jan. 20, 1799, *ibid.*, II, 514–515.

[82] Letter, Tazewell to Jefferson, July 5, 1798, Jefferson Microfilm, Library of Congress, No. 35; Sedgwick to King, July 1, 1798, *loc. cit.*

[83] *Gazette of the United States*, Dec. 6, 1798.

It is difficult to determine what measure of truth there was to Duane's story. If the facts were as stated, this caucus would have provided an early example of use of a method of promoting effective party action which has been the subject of frequent discussion since. Duane himself stated that the information came "indirectly" from two Senators present. If he were given opportunity, said he, he would have 12 Senators and the current Speaker of the House (Sedgwick) swear to the truth of his story.[84] Such a caucus would not have been the first held at Bingham's home. It is, furthermore, true that there were about 17 Senators in 1798 who might be termed "regulars" and likely to attend such a caucus if held. An analysis of the Federalist Senators' votes during the session reveals a great deal of Federalist unanimity on the principal measures dealing with the French crisis, a unanimity which could have been the result of a pledge such as Duane mentioned.[85]

However, the Senators themselves denied that Duane's story was true—in fact, they officially resolved that the account was "false, defamatory, scandalous, and malicious." [86] Duane stated that the caucus was held in the "summer session of 1798," while actually many of the Federalist measures he referred to were introduced months before the summer arrived. Bingham himself apparently did not consider himself bound by such a party pledge, for he voted to deny Senator Lloyd permission to introduce the critical sedition bill, and was unaccountably absent when the final vote was taken. The Federalists had such a topheavy majority in the Senate at that time that perfect party regularity was hardly essential. Finally, in view of the temper of the Federalists during the session, it is not necessary to ascribe the regularity of the Federalists Party votes to a formal pledge. On the Republican side, six of the eight party adherents showed a party regularity easily equal to that of their Federalist colleagues.[87]

Whether or not the complete Federal dominance of the Senate during this session was due to formal party discipline, by the close of this session the Republican voice had been reduced to a mere whisper. On July 11, 1798, the minority could muster only four votes against the bill to encourage captures of French armed vessels by American privateers, a bill which was subsequently defeated in the House. Two days later, when the bill to augment the Army came up for final passage, there were only three Republicans present and only two of them voted against the bill.[88] Vice President Jefferson himself, realizing the hopelessness of the Republican cause in the Senate, had already left for Virginia. There, in the friendlier climate of his own State, he could organize the Kentucky and Virginia campaign against the forces in control of the Chamber of which he was the President.

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[84] *Aurora*, Apr. 2, 1800.

[85] *Senate Journal*, 5th Cong., 2d sess., *passim*.

[86] *Annals*, 6th Cong., 1st sess., May 14, 1800, p. 184.

[87] *Senate Journal*, 5th Cong., 2d sess., *passim*.

There was considerable absenteeism during this session. On May 15 the Senate Secretary was directed to write all Senators absent without permission to return to their duties. On June 25 the Senate, acting on the recommendation of a committee named 5 months earlier, added enforcement machinery to its standing rule against absences without official leave. See ch. XII, *supra*.

[88] *Ibid.*, 5th Cong., 2d sess., July 11, 1798, p. 451; July 13, 1798, p. 466.

CHAPTER XVII

THE DECLINE AND FALL OF SENATE FEDERALISM

As Senators and House Members converged on Philadelphia early in December 1798 to begin the third session of the Fifth Congress, the Senate's Federalists came prepared to serve again as the shock troops in the struggle against the "disorganizers." But like the Samson of another day, they knew not that their strength had departed.

During the recess of Congress, the political pot had kept boiling. Hamilton's appointment as second in command of the new Army stirred up bitter animosities. Enlistments in the ranks lagged. The Kentucky and Virginia Legislatures passed their famous resolutions. Resentment against the Alien and Sedition Acts developed apace. On the other hand, the continued resentment against France was reflected in the fall elections, which gave the Federalists an increased House majority for the Sixth Congress due to open in December of the following year. They were yet to learn that this show of strength was deceptive.

The Senate and the New Mission to France

In his message at the opening of this, the "lame duck" session of the Fifth Congress, President Adams recommended extension and invigoration of the national defense, especially the Naval Establishment, to meet the continuing French aggressions. He accompanied this recommendation, however, with the declaration that peace with France was the Government's fondest aim, and left the door open to further negotiations if France would take the first step.

The reply of the House of Representatives reflected very closely the tenor of the President's message. The Senate, on the other hand, gave an inkling of its future troubles with the President in the tone of its reply. The upper Chamber took great pains to direct renewed attention to the hostility of the French Government to the United States and failed to respond to the President's profession of peaceful intent or to his readiness to renew negotiations.[1]

The High Federalists who controlled the Senate differed with their more moderate brethren on the subject of a declaration of war or deliberately provoking such a declaration by France. They were still disgusted with the "feebleness" of many of the party's protagonists in the House, who showed "a want of system, & of spirit & vigor" in sponsoring the aims of the Federalist Party.[2]

That the High Federalists in the Senate not only desired war but were privy to the designs being laid for the use of the newly organized troops is apparent from a letter Senator Sedgwick, Hamilton's closest confidant in the Senate, wrote Rufus King on January 20, 1799:

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[1] Richardson, *op. cit.*, I, 261–270.

[2] Letter, Sedgwick to King, Jan. 20, 1799, King, *op. cit.*, II, 514–515.

> We ought at once to have put an end to the cooperation of external and internal enemies—to have at once, as far as is in our power, prevented the possibility of their carrying on that most dangerous species of warfare for the seduction of our people, "diplomatic skill." This could not in my opinion have been done effectively but by a declaration of war. This would have conduced equally to the honor & interest of the U.S. To have taken advantage of that measure it would have been necessary to consider Spain, as in fact she is, a Colony of France. * * * The mouth of the Mississippi & the country connected with and dependent on it should have been immemdiately seized.[3]

Senator Tracy was even more frank in his desire to see the new Army used against the Republicans at home. He regretted that the affair of the Kentucky and Virginia Resolutions had ended so tamely. "I had wished," he declared, "that all the discontented would have made an effort at this time to overturn the Federal Government." A little bloodshed would have established that Government more solidly than ever—with the Federalists firmly in the saddle, he might have added.[4]

In fairness to the High Federalists it must be noted that they were thoroughly convinced that the peace and safety of both Europe and the United States were bound up in the defeat of the French aggressors and the constraint of their sympathizers in America.

Under the circumstances, it is hardly surprising that partisan feeling in Congress, as well as elsewhere in the Nation, remained at fever level. After much wrangling, the Federalists finally pushed through some further legislation to meet the crisis, but the Senate leaders continued to be embarrassed by the lukewarm Federalism of many Members of the narrow House majority. Moreover, Federalists of both Houses were placed on the defensive by the petitions, signed by thousands of voters, protesting the Alien and Sedition Acts and other parts of the Federalist program.[5]

Since assuming the Presidency, Adams had always dealt with the Senate at arm's length. As this session drew to a close the distance between the President and the Chamber over which he had presided for 8 years widened. An interview between the President and Senator Sedgwick in February brought no meeting of minds.[6] Despite the bitterness against France which he often expressed, Adams had constantly thought in terms of defense and an honorable settlement rather than the aggressive designs of the High Federalists. However, he apparently made no effort to cultivate the more moderate Senators in order to bring them around to his viewpoint. Reserved, self-centered, acutely conscious of the dignity of the Presidential office, Adams was not the type of individual to whom that line of conduct would suggest itself.

On February 18, 1799, Adams, having received the desired assurances from Talleyrand, tossed a bombshell into the upper Chamber in the form of his nomination of William Vans Murray as special Minister to attempt to settle the difficulties with France. The concussion threw High Federalism against the Senate wall.

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[3] *Ibid.*

[4] Letter, Tracy to Jonathan Trumbull, Jan. 2, 1799, cited by Miller, *op. cit.*, p. 173, from Trumbull MSS, Connecticut Historical Society.

[5] Letter, Jefferson to Edmund Pendleton, Feb. 14, 1799, Lipscomb, *op. cit.*, X, 105. See also other Jefferson correspondence in the same volume.

[6] Letter, Sedgwick to Hamilton, Feb. 7, 1799, John C. Hamilton, *Works of Hamilton*, VI, 394.

The consternation displayed by the Senate majority illustrated how thoroughly its Members were imbued with the High Federalist purpose of exploiting the quarrel with France to the full. The party and the Senate had both been insulted and their program brought into contempt. And by whom? By the nominal leader of the party—by the President to whom the Senate was supposed to be a "council of advice" on diplomatic matters! Adams' action robbed the Federalist leaders of the battle cry which alone could rally the country behind them. Their resentment against the President was intense. "Had the foulest heart and ablest head in the world been permitted to select the most embarrassing and ruinous measure," wrote Sedgwick, "perhaps it would have been precisely the one which has been adopted.[7]

The Senate's response to the nomination also demonstrated the influence Alexander Hamilton still exercised in the Senate. Sedgwick was unwilling to act without first consulting the former Secretary, and immediately wrote to him for advice. Hamilton replied that it would be inexpedient to veto the mission altogether. In this he was doubtless absolutely correct—refusal to treat with France when that country seemed willing to reconcile the differences would have put the Federalists in an intolerable position, one which the Republicans would have been quick to utilize for their own purposes. Hamilton recommended, however, that two Members be added to the mission. Two tried-and-true Federalists could serve as watchdogs for the party. In their recommendations to the President, the five stanch Federalists appointed to discuss the mission with him followed Hamilton's advice to the letter. Adams, rather than see the mission rejected, reluctantly acquiesced.[8]

The compromise did not mollify the high Federalists. Sedgwick believed that the President's act had paralyzed "the federal nerve" and was grieved to learn that even good New England Federalists now wondered why the Army was necessary. Tracy in despair contemplated leaving public life. They and their associates never forgave the President for what he had done.[9]

"ADAMSITES AND PICKEROONS"

As the months went by, the resentment against France on which the Federalists had fed gradually diminished. High Federalist fought Adams Federalist more bitterly than either fought the Republicans. Badly divided and minus its most appealing issue, the future of Federalism was not bright. A *modus vivendi* between the President and the leaders of Senate and House was worked out, but the Federalist Party in Congress, particularly in the Senate, was never again the same.

When Congress met for the first session of the Sixth Congress in December 1799, the Federalists held a better position numerically than they had enjoyed since party lines were first sharply drawn.

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[7] Letter, Sedgwick to Hamilton, Feb. 19, 1799, *ibid.*, VI, 397.

[8] For a discussion of the institutional aspects of these differences between President and Senate, see ch. VIII, *supra.*

[9] Letter Sedgwick to King, Dec. 12, 1799, King, *op. cit.*, III, 154–156; Tracy to McHenry, Sept. 2, 1799, Bernard C. Steiner, *Life and Correspondence of James McHenry* (Cleveland: Burroughs Co., 1907), pp. 416–417.

In the Senate, the Federalists still enjoyed a 2-to-1 majority, although they regretted the loss of tried-and-trusted party men like Richard Stockton of New Jersey and, especially, Theodore Sedgwick of Massachusetts. The former had been replaced by the arch-speculator Jonathan Dayton, previously of rather uncertain party allegiance but now "furiously Federal and Anti-Jacobin." The highly partisan Sedgwick, one of the most influential Senate Federalist leaders and close confidant of Hamilton, had sacrificed his Senate seat to run for the House in order to rescue one of the Massachusetts seats in the lower Chamber from a grave Republican threat.[10] During the session, the brilliant but cynical Gouverneur Morris arrived to take one of the New York seats. On the Republican side, the minority was strengthened by the arrival of Charles Pinckney of South Carolina, denounced by the Federalists as "Blackguard Charlie" but admired by the Republicans as one of the most able and forthright protagonists of their party. He was very highly regarded by William Duane of the *Aurora*, who printed his Senate speeches in full—something new for Members of the upstairs Chamber.

In the House, many new Members elected during the furor over the XYZ affair now assumed their seats, giving the Federalists an apparently solid majority of 20 votes. The Federalists were especially pleased with the arrival in the lower Chamber of John Marshall, coauthor of the XYZ reports which had done so much to strengthen the Federalist cause.

However, from the very beginning the Sixth Congress was a bitter disappointment to the Federalists. A few days after the opening of its first session, the great and good George Washington died—a hard blow to the Federalists, for in his last days the ex-President had been more and more outspoken in his Federalism. The large Federalist majority in the House, under the pressure of public opinion, proved extremely unreliable. According to Jefferson, when many new and moderate Federalist Members saw the "true character of the party to which they had been well disposed at a distance" they soon shied away.[11] The amiable John Marshall proved too moderate a Federalist to suit High Federalist tastes.[12]

More serious, the majority, taken off guard by the President's decision to treat with France, had no fixed plan of action—some Members wanted to strengthen the Navy and destroy the Army, some were for cutting down both. "The spirit of Federalism was neutralized by the peculiar state of its head [Adams]" was the bitter complaint of ex-Senator George Cabot. The President considered the firm party men his enemies, he added. "The embarrassment is felt everywhere and no one of the Leading Politicians in Philadelphia consults *freely* or is consulted by the others." [13]

With respect to the Senate, Vice President Jefferson, looking back on the experience of the session, observed:

> The Senate alone remained undismayed to the last. Firm to their purpose, regardless of public opinion, and more disposed to coerce than to court it, not a man of their majority gave way in the least * * *.[14]

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[10] In the House, the Federalists showed their gratitude to Sedgwick by promptly electing him Speaker.

[11] Letter, Jefferson to Madison, May 12, 1800, Lipscomb, *op. cit.*, X, 166.

[12] Letter, Sedgwick to King, May 11, 1800, King, *op. cit.*, III, 237.

[13] Letter, Cabot to King, Jan. 20, 1800, *ibid.*, III, 182; Cabot to King, Mar. 14, 1800, *ibid.*, III, 210; Hamilton to King, Jan. 5, 1800, Lodge, *Works of Hamilton*, X 359.

[14] Letter, Jefferson to Madison, May 12, 1800, Lipscomb, *op. cit.*, X, 166.

Although the Senate's intransigence was not quite as extreme as the Vice President claimed—it relented sufficiently to suspend Army enlistments, much to Hamilton's chagrin—the essential problem of the upper Chamber, from the Federalist viewpoint, was not lukewarm party loyalty but loss of nerve. Its "purpose" to which the Vice President referred was hardly more than the instinct of self-survival. Aside from a continued effort to exploit the conflict with France and other moves to keep themselves in power, the High Federalist leaders had little in the nature of a positive program to offer the country. This weakness made them ill at ease, petulant, and irritable—prone to political mistakes that brought the Senate to a new low in unpopularity.

The High Federalists' enduring resentment against the President for sponsoring the new mission to France was apparent from the very beginning of the session. When Adams in his third annual address spoke hopefully of the mission's success, expressed a desire to give offense to none of the European belligerents, and stressed a purely defensive Military Establishment, the House—controlled as it was by moderate Federalists—replied in unusually friendly terms. The Senate, on the contrary, answered with complete lack of enthusiasm and omitted most of the expressions of good will with which the Senate replies had invariably closed.[15] The implications were not lost on the occupants of the Executive Mansion. Wrote the First Lady:

> The replie of the Senate cold and Languid, fully discovers in what school they have imbibed their sentiments. The committee chosen to draught the replie, were known to be some of the most opposed to the Mission.[16]

The strong-willed Abigail's further remarks indicated that the "school" she mentioned was headed by Secretary of State Pickering, whose influence—together with that of Hamilton—was strong among the High Federalist leaders. When, late in the session, the President finally dismissed the refractory Secretary, the division in the Senate widened. The highly critical *Aurora* noted the situation with great glee. On February 17, 1800, its editor, William Duane, divided the Senators into three groups—Republicans, "Strung up" (friends of Adams ready to abandon the Hamilton party), and "Thoroughgoing high-toned legislators" (Hamiltonians).

Three months later, after the explosion in the Cabinet, he revised his lists considerably and divided the Senators among Republicans and two factions of "Aristocrats"—"Adamsites" and "Pickeroons." The latter group the *Aurora* held responsible for all the "intrigues and villainy" practiced by the Senate.[17]

Neither of Duane's groupings was very accurate, if one uses the vote on the Convention of 1800 with France as the criterion of support of the President, but it was clear enough that uncertainty as to whether to follow Adams on the one hand or Pickering and Hamilton on the other dissipated the energies of the Federalist majority. John Ward Fenno, who had succeeded to the editorship of the Federalist *Gazette of the United States* on the death of his father and who sided with Pickering, bitterly reproached the Federalist Senators who joined the Republicans in voting for the bill suspending enlistments in the Army. He called this a "ruinous step" carried by Federalist Senators "who, under the influence of I know not what wretched calculations, advanced into what they deem a neutral region, to embrace the enemy." The independent Federalist Senator from Kentucky, Humphrey Marshall, considered this Fenno article a more vile and flagrant slander than any found in the *Aurora*.[18]

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[15] Richardson, *op. cit.*, I, 279–286.
[16] Letter, Abigail Adams to her sister, Dec. 11, 1799, Mitchell, *op. cit.*, p. 221.
[17] *Aurora*, May 19, 1800.

The *Aurora*, meanwhile, published story after story about frenzied "caucuses" held at the lodgings of South Carolina Senator Jacob Read and elsewhere, at which the Federalists allegedly planned desperate measures to keep themselves in power but bitterly disagreed on what candidate to support for President in the fall election. In one issue Duane claimed that Senators Hillhouse and Dayton, Speaker Sedgwick, and Representative Bayard were supporting Ellsworth. In another issue he claimed that at a tumultous caucus Senator Jacob Read had favored Charles Cotesworth Pinckney, some had favored Thomas Pinckney, others Timothy Pickering, while only a few had remained steady for Adams. He declared that the caucus had finally agreed to support C. C. Pinckney and Pickering.[19]

Duane, of course, was so universally hated by the Federalist leaders that he had no direct sources of information concerning the alleged caucuses he described. Fenno claimed that Duane's description of the caucus allegedly supporting C. C. Pinckney and Pickering was a complete fabrication. He asserted that Senator Read, at whose lodgings the caucus was said to have taken place, was at the theater at the time, and Senator Goodhue, whose alleged remarks Duane quoted, had already left for Massachusetts.[20] Duane was no doubt using "scattergun" tactics in the hope that some of his missiles would find the target. Diehard High Federalists did, indeed, take part in the intrigues to replace Adams, with disastrous results for their party.

THE SENATE, THE ROSS BILL, AND THE DUANE CASE

During the course of the session, two closely connected series of events combined to bring down upon the Senate a new wave of censure and ill will. The first was the Federalist effort to obtain passage of the Ross disputed elections bill, the other was the prosecution of William Duane for contempt of the Senate.

On January 23, 1800, Senator James Ross, recently defeated Federalist candidate for Governor of Pennsylvania, rose in the Senate and called for appointment of a committee to consider what provisions, if any, should be made for deciding disputed presidential elections and determining the legality of the electoral votes cast. If Duane's account was correct—and his statements often were not—the subject had been discussed at a Federalist caucus in the Senate Chamber a few nights before.[21]

Over the objections of the Republicans, who claimed that the Constitution gave Congress no power to legislate on the subject, the Senate the following day named a committee of four Federalists—Ross, Laurance, Dexter, and Livermore—and one Republican—Pinckney—

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[18] Address of Marshall. *Annals*, 6th Cong., 1st sess., Mar. 5, 1800, pp. 93–96.

[19] *Aurora*, Feb. 15, 1800, Mar. 15, 1800, Mar. 29, 1800, May 16, 1800, and May 20, 1800.

[20] *Gazette of the United States*, May 26, 1800.

[21] *Annals*, 6th Cong., 1st sess., Jan. 23, 1800, pp. 29–32; *Aurora*, Feb. 19, 1800.

to prepare a bill.[22] Three weeks later the committee reported a measure which turned out to be one of the most execrated proposals in the history of the Senate's early years.

The bill provided that as soon as the certificates of the electoral votes had, in the February following a presidential election, been read before Congress, they were to be submitted to a "grand committee" consisting of six Senators elected by the upper Chamber, six Representatives elected by the lower Chamber, and (to serve as chairman) the Chief Justice of the Supreme Court, or if he were not available, the next senior Associate Justice. This "grand committee" was to have full power to examine and decide upon the qualifications of the electors and the manner in which they had been elected and to determine which electoral votes should be counted and which should not. The Republicans opposed the fundamental idea of the bill—a grant to the Federal Government of authority to pass upon the qualifications of electors—a power they believed belonged to the States alone. But they found equally reprehensible the provisions that the committee's deliberations were to be held in secret and that its decisions were not to be subject to appeal to any higher authority.[23]

Some legislation prescribing the procedure in case of disputed presidential elections was doubtless desirable, as witness the Tilden-Hayes imbroglio of 1876. Over a period of years, with both parties having opportunity to control either or both Houses of Congress and the chairman being a Supreme Court Justice solemnly sworn to impartiality, the Ross bill may not have given either party any particular advantage. However, it is clear that the bill was framed with the 1800 Presidential election in mind. The Federalists controlled both Houses of Congress—although the lower Chamber was more moderately Federalist than the Senate leaders liked. To be quite specific, by their own admission they hoped to exploit the confused situation in Pennsylvania, where Federalists were pitted against Republicans in an effort to change the existing method of choosing presidential electors. If enough Republican electors from Pennsylvania could be disqualified, the 1800 election would no doubt keep the Federalists in power. Wrote Speaker Sedgwick to Rufus King a few months later:

> Looking forward to the ensuing election, it was deemed indispensable to prescribe a mode for canvassing the votes, provided there should be a dispute. There being no law in the state [Pennsylvania], * * * the jacobins propagated the report * * * that he [the governor] would return their votes. A bill was brought into the Senate & passed, wisely and effectually providing against the evil, by the constitution of a committee with ultimate powers of decision.[24]

While the bill was before the Senate, the Federalists defeated one attempt after another to mitigate the partisan character of the bill. Amendments providing that the grand committee be chosen by lot instead of ballot, that its proceedings be held in the House Chamber with doors open, and that a two-thirds vote be required for rejection of an elector—all were defeated by 2-to-1 votes. In addition, at a point in the Senate debate not indicated by the *Annals* or *Journal*, the bill was modified to eliminate the Chief Justice as the committee chairman and to substitute a chairman chosen by the House from among three names proposed by the Senate—giving the Senate's Federalist majority power to guarantee that the chairman would be one of their number.[25]

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[22] *Senate Journal*, 6th Cong., 1st sess., Jan. 24, 1800, p. 69.
[23] *Aurora*, Feb. 19, 1800, Feb. 20, 1800.
[24] Letter, Sedgwick to King, May 11, 1800, King, *op. cit.*, III, 237–238.

The bill evoked a tremendous outcry from the Republicans, particularly from the Republican press. Even the more moderate Federalists opposed it. In addition to all its other powers, the Senate, said the critics, would now, through its majority on the proposed grand committee, also have the power to flout the people's will and control Presidential elections.[26]

The bill passed the Senate on March 28, 1800, by a vote of 16 to 12, only Samuel Livermore defecting from the solid Federalist phalanx.[27]

To the high Federalists' regret, the carefully laid plans of their leaders were again derailed by the more moderate Federalism of the lower House. This time the House switchman was John Marshall, whose sense of justice was outraged, not by the idea of a Federal election disputes bill but by the autocratic power of the proposed grand committee, the virtual choice of its chairman by the Senate, and the finality of its authority. He did favor a joint committee of Senate and House to investigate alleged election frauds and illegalities, the decisions of which could be overruled by concurrent vote of the two Houses. After much debate, such a bill passed the House.[28]

However, the bill as passed by the lower Chamber no longer served the purposes of its original sponsors. The intransigent high Federalists in the Senate refused to accept the House amendments, the House again refused to accept the Senate version, and through this disagreement between the two Houses the bill was lost.[29]

The Federalist effort to control the 1800 Presidential election failed, but not by any purpose of the Senate. The Nation, observing these events, again identified the upper Chamber with the desperate tactics of perverse high federalism.

While the Senate was being anathematized for its sponsorship of the Ross bill, its cup of unpopularity was made to overflow by its arbitrary action in the contempt case against William Duane.[30]

As editor of the *Aurora*, Duane was a fitting successor of the vituperative Benjamin Franklin Bache, about whom George Washington had written that "his calumnies are to be exceeded only by his impudence, and both stand unrivaled." [31] From the time he had taken over the editorship upon the death of Bache in the plague of 1798, Duane had heaped invective on the Federalists. In 1799 he had asserted that the British Minister in Philadelphia had spent $800,000 in behalf of the Federalists in the 1798 elections and as a result exercised more influence in the Government than did the Revolutionary veterans. For this and other allegations he had been unsuccessfully prosecuted for sedition in both State and Federal courts and had been attacked by mobs wearing the black Federalist cockade. He was not above using methods bordering on blackmail in his journalistic campaign against the Federalists.[32]

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[25] *Annals*, 6th Cong., 1st sess., Feb. 20, 1800, to Mar. 3, 1800, pp. 49–67; *ibid.*, Mar. 28, 1800, pp. 129, 141.

[26] *Aurora*, Apr. 1 and 3, 1800, May 1 and 8, 1800, June 6, 1800, and *passim*. Many of these *Aurora* articles were quotations from other current newspapers, or from private or public letters.

[27] *Annals*, 6th Cong., 1st sess., Mar. 28, 1800, p. 146.

[28] Beveridge, *op. cit.*, II, 454–458, citing *ibid.*, pp. 691–692, 687–710, and letter, Jefferson to Livingston, Apr. 30, 1800, Ford, *Writings of Jefferson*, IX, 132.

[29] *Annals*, 6th Cong., 1st sess., May 8, 1800, pp. 176–177; May 9, 1800, p. 178; May 10, 1800, p. 179.

[30] See ch. XII, *supra*.

[31] Letter, Washington to Jeremiah Wadsworth, Mar. 6, 1797, Fitzpatrick, *Writings of Washington*, XXXV, 421.

In view of Duane's record as a thorn in the side of their party, it is not surprising that the Federalists in the Senate reacted with extreme sensitivity when the editor in the *Aurora* of February 19, 1800, printed a full set of new allegations. After printing in full the text of the Ross bill, which he had obtained by clandestine means, he asserted that plans for introduction of the bill had been laid at a secret Federalist caucus in the Senate Chamber, that it was designed to frustrate the wishes of the people of Pennsylvania, that Pinckney had been excluded from a meeting of the committee appointed to draw up the bill although he was a member of that committee, and finally that in the summer of 1798 a secret Federalist caucus had contrived a scheme by which the Senate would be ruled by as few as nine Members of the majority party.

The Senate's response to this challenge has already been described—how an all-Federalist Committee of Privileges denounced the article; how Duane was hailed before the Senate to answer contempt charges, while being denied counsel except under severely limited conditions; how he thereupon refused further attendance on the Senate and challenged the Federalists to do their worst; how the Senate found him guilty *in absentia* but failed to apprehend him, and finally how his prosecution under the Sedition Act dragged along until the Republicans came into power and the charges were dropped.

Although the Senate's Federalist majority, led by Dayton, Read, and Tracy, based its punitive action on the claim that Duane had brought the Senate as an institution into contempt, it is obvious that the desire to punish him was based wholly on partisan considerations. John Ward Fenno, editor of the *Gazette of the United States*, in denouncing the Senate's passage of the bill suspending enlistments in the Army, used language as withering and contemptuous as any Duane employed, but the Federalist majority failed to act against him—since he and his paper were strong proponents of the Federalist cause.[33]

During these proceedings, which naturally attracted wide public interest and filled the Senate galleries—for once—to capacity, Duane very shrewdly availed himself of every opportunity to play on public sympathy and to place the Senate in an unfavorable light. He described the Senate proceedings in his paper in minute detail. He reported the speeches of his Federalist foes as well as of his Republican friends, but the declamations of the latter against tyranny, injustice, and violation of the freedom of the press had far more popular appeal than the studied and often querulous arguments of the Federalists. Cried Duane's friend, Charles Pinckney:

> Is it a pleasant sight to our citizens, to see sergeants-at-arms, with their rods, inquisitorially seizing freemen, and dragging them to your bar, and there exhibiting them as criminals, or spectacles to crowded audiences, merely because they thought they had a right to attack, by argument, proceedings which appeared to them unconstitutional?[34]

In the pages of his paper, Duane pictured himself as a law-abiding, deferential citizen who recognized his obligation to pay due respect to the Senate as part of the Government of his country but owed a higher duty to the Constitution, human liberty, and his own rights and honor. In the meantime, he kept up a running attack on the Senate majority and all its works, past and present, charging that Senators Read, Tracy, Hillhouse, Dexter, Dayton, and Goodhue were establishing in America a facsimile of the English Star Chamber.[35]

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[32] Miller, *op. cit.*, pp. 194–199.

[33] *Annals*, 6th Cong., 1st sess., Mar. 5, 1800, p. 96.

[34] *Ibid.*, pp. 69–84. Pinckney delivered the principal address in Duane's behalf.

Friends of Duane meanwhile circulated a petition in the editor's behalf, denouncing the Senate for usurpation of power and denial of basic civil liberties. Duane claimed that among the signatures on this remonstrance were those of "a most respectable number" of Republicans and of Federalists as well.[36] On May 10, 1800, 4 days before the end of the session, the remonstrance was presented to the Senate by William Bingham.[37] A sharp disagreement followed as to whether or not the petition ought to be read, some of the Federalists complaining of the alleged "indecency" of its language. After a tie vote, Vice President Jefferson cast the deciding vote in favor of reading it. When the document had been read, one of the Senators desired to know the names of some of the signers. Whether by accident or design, the first name read was that of a "Patrick McCarty." Duane claimed that as this stoutly Irish name was read, "a forced smile of contempt was evident on the faces of some of the phalanx." [38]

Although Duane's remarks which caused the furor were intemperate and of doubtful accuracy, the Senate Federalists' attempt to punish him was a grave political blunder, demonstrating their complete inability or unwillingness to understand the temper of the people or to grasp the role of public opinion. Added to the resentment aroused by the Senate's concurrent effort in behalf of the Ross bill—in a country already inflamed by the Senate-sponsored Sedition Act—the arbitrary nature of the prosecution of the *Aurora* editor brought new popular condemnation on both the Federalist Party and the Senate.

The following February, in the new wilderness capital, a number of citizens, headed by Virginia's Senator Stevens T. Mason, grateful to Duane for his services in the Republican cause, feted the editor at a testimonial dinner at the Columbian Inn. Time after time the diners raised their glasses in honor of Duane as they drank toasts—

> To Aurora. The radiant precursor of eternal day.
>
> The Editor, to whom (the chosen instrument of heaven) we principally owe the triumph of the day * * *
>
> Those men who have suffered in dungeons or been injured in their fortunes for magnanimously asserting the rights of man, and the generous principles of representative democracy.[39]

The High Federalists, riding out the last days of the last Federalist administration, saw no humor in the situation.

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[35] *Aurora*, Mar. 21, 1800.

[36] *Ibid.*, Mar. 28, 1800.

[37] McMaster maintained that designation of Bingham, whom Duane had denounced as the host to the notorious caucus of 1798, as the Senator to present the remonstrance was a "mark of especial derision." This was probably not the case. Since the petition emanated from citizens of Pennsylvania, it was natural that it should be presented by one of the Pennsylvania Senators. The other Senator from that State was James Ross, who would surely have been a far less likely choice. See McMaster, *op. cit.*, II, 465.

[38] *Aurora*, May 13, 1800. In McMaster's citation of this same *Aurora* article, the "forced smile of contempt" became "shouts of laughter." See McMaster, *loc. cit.* The *Aurora* account was good propaganda, but it is at least doubtful whether the gallery observer could distinguish between a "smile of contempt" and any other type of smile.

[39] *National Intelligencer*, Feb. 25, 1801.

The Federalist Castle Falls

When November 1800 arrived and the time came for convening the second session of the Sixth Congress, the Members did not gather in the familiar surroundings of Philadelphia's Congress Hall, scene of the Federalist triumphs of past years, but in the new wilderness capital of Washington, D.C.

As the Senators took their red morocco seats in the new but stately dignity of the half-finished Capitol, the Federalists wore a dejected air which even their two-to-one majority could not dissipate. The catcalls provoked by their conduct in the Ross disputed-elections affair and the Duane case were still ringing in their ears. During the summer and fall just passed the division among their number had been further widened by the Hamiltonian intrigue to replace Adams by C. C. Pinckney. The anti-French storm which they had hoped to fan to hurricane strength and ride to new victories had stilled to a zephyr.

As the weeks went by, their gloom deepened. Mail from the 16 States brought the news that the Republicans had captured a 20-seat majority in the House elections for the Seventh Congress. Worst of all, it was their unhappy duty on February 11 to count the electoral votes for President, in the full knowledge that a Republican, Jefferson or Burr, would be the next Chief Executive. With the lower House and the Presidency in the grip of their enemies, what chance had they to stay the Jacobin tide? Some of the Federalist Senators like Gouverneur Morris took the attitude that since it was the obvious desire of the electorate that Jefferson be President, its wishes should be respected. Others, like the speculator-politician Jonathan Dayton, worked for Burr. At any rate, the Senators could only whisper advice from the wings while the House of Representatives played out the last seriocomic act of the election drama.

While ballot after ballot in the House failed to elect a President, there was a flurry of excitement among the Republicans when the rumor reached them that the Federalists would refuse to break the tie and thus fail to elect either a President or Vice President, creating a vacancy in the former office to be filled by a Federalist President *pro tempore* of the Senate. There was some furious talk of armed Republican brigades marching on Washington to prevent such a usurpation, but this stopped suddenly when the tie was broken and Jefferson was elected.[40]

The Presidential election, which was not decided until 2 weeks before adjournment of the session, dominated the interest of Senators and Representatives alike during almost the entire 3½ months of the lameduck session. In the meantime, however, President Adams diverted the attention of the Senators from the election arena by placing before them the distasteful problem of whether or not to approve the convention with France negotiated by Murray, Ellsworth, and Davie.

The treaty draft put the Senate high Federalists on the horns of a dilemma. They bitterly disliked coming to terms with the "patron nation" of their political enemies. Approving the treaty would seem to be placing the stamp of their approval on Adams' decision to authorize the mission. On the other hand, the mercantile interest wanted the maritime conflict settled. Hamilton, although believing that the treaty was a "make-weight in the wrong scale," reluctantly advised ratification because rejection of the popular document would utterly ruin the Federalist Party.[41] The more adamant Federalists fought the treaty tooth and nail, but in the end were unable to hold the party line. On the final vote, they could muster only nine negative votes.[42] The division within the Federalist ranks could not have been more eloquently illustrated.

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[40] See ch. XV, *supra*.

As far as domestic legislation was concerned, the badly divided Senate left to the House the task of initiating almost the entire program. In fact, the lower Chamber originated 33 of the 35 bills passed. Among these measures was the famous Judiciary Act of 1801.

Federalists of both Senate and House saw that the Presidency and the lower Chamber were lost to their party. With State legislatures coming more and more under the power of the hated Jacobins, how long could the Senate survive as the stronghold of federalism in a world gone mad? Federalist judges would have to grasp spear and shield from the enervated hands of the Senators and defend the Federalist cause. Senator Gouverneur Morris, using another metaphor, asked whether the Federalists—who were "about to experience a heavy gale of adverse wind"—could rightly "be blamed for casting many anchors to hold their ship through the storm." [43] That the "focus of Federalism" was about to shift from the Senate to the judiciary was made clear at a banquet honoring the retiring Secretary of the Treasury, Oliver Wolcott, presided over by Senator James Ross and attended by Federalist Members of Congress, heads of departments, and Justices of the Supreme Court. There, amid the tinkling of Federalist glasses, a toast was offered to "The Judiciary of the United States! Independent of party, independent of power, and independent of popularity!" [44]

When the judiciary bill came up from the House, it was referred to a solidly Federalist committee and then pushed through without a single amendment that would force it to conference and delay its final approval. Not one Republican relented in his opposition on any one of the seven votes on the bill. On the other hand, the minority party attracted four Federalist votes to a substitute providing for fewer circuits, fewer judges, and a larger Supreme Court, which was only defeated by the comparatively narrow vote of 17 to 13. However, when the bill came up for final passage the next day, only two Federalists gave way and the bill was approved 16 to 11.[45]

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[41] Letter, Hamilton to Sedgwick, Dec. 22, 1800, and Hamilton to G. Morris, Dec. 24, 1800, Lodge, *Works of Hamilton*, X, 397–398.

[42] *Annals*, 6th Cong., 2d sess., Feb. 3, 1801, pp. 777–778.

[43] Letter, Morris to Robert Livingston, Feb. 20, 1801, Jared Sparks, *Life of Gouverneur Morris with Selections from His Correspondence and Miscellaneous Papers* (Boston: Gray & Bowen, 1832), III, 153–154.

[44] *Gazette of the United States*, Feb. 7, 1801.

[45] *Senate Journal*, 6th Cong., 2d sess., Feb. 7, 1801, p. 63. Beveridge stated that the Republicans fought the bill itself with less vigor and animosity than they did the partisan manner in which the resultant appointments were made. See Beveridge, *op. cit.*, II, 548–550. Actually, the furor produced by the act was due, not so much to the nature of the bill itself, but to its timing. If the Federalists had performed their duties more efficiently in the previous session, the bill would not have had to be postponed to the lame-duck session and the Federalists would have escaped much of the odium attached to the "midnight" appointments. See Lynch, *op. cit.*, p. 123.

For reasons not readily apparent, James Hillhouse, the stanch Federalist who served as chairman of the committee considering the bill in the Senate, consistently voted against it.

For once the aims of President Adams coincided with those of his Federalist opponents in Congress. He set to work with a will naming Federalists to the resultant judgeships in the famous "midnight appointments." He even named two Senators—Ray Greene, of Rhode Island, and Jacob Read, of South Carolina—to judicial posts, avoiding a violation of the Constitution by transferring incumbent district judges to newly created posts and appointing the Senators to the resultant vacancies.[46] In the meantime, Adams had on January 20, 1801, nominated John Marshall Chief Justice of the Supreme Court in place of Oliver Ellsworth, who had resigned on account of illness. The nomination was received with little enthusiasm by the Federalists in the Senate, none of whom had been previously consulted. It was generally thought that Justice (ex-Senator) William Paterson was ex-Senator Ellsworth's logical successor. Confirmation was delayed for a week, but on January 27 Marshall was unanimously confirmed. However hesitant they might have been, the Senate Federalists, eager to extend the period of their party's power and influence, wrought better than they knew in confirming Marshall's appointment.[47]

The Federalist period of American history drew to a close. Vice President Jefferson in friendly terms bade farewell to the Chamber over which he had efficiently but uneasily presided for 4 years. Gouverneur Morris prepared the Senate's reply. The President-elect was assured that the Senate would never withhold cooperation from a President influenced by a due regard for the honor and interests of his country.

> In the confidence that your official conduct will be directed to these great objects, a confidence derived from past events, we repeat to you, Sir, the assurance of our constitutional support in your future administration.

Characteristically, a group of Federalist diehards could not agree to permit Jefferson to depart with such approving sentiments ringing in his ears. One of them introduced a motion to strike out the words "a confidence derived from past events." Nine senators applauded.[48]

As the Federalists feared, the "Jacobins," with their superior local organizations and their closer identification with the interests of the mass of the citizenry, were at work in the State legislatures, replacing Federalists with Republican "disorganizers." Dr. George Logan, who had aroused the Federalists' ire by going to France on his own responsibility to avert war with that country, took the seat of the wealthy Pennsylvanian, William Bingham.[49] Robert Wright replaced William Hindman, of Maryland. Christopher Ellery replaced Ray Greene, of Rhode Island. John E. Colhoun took the chair vacated by South Carolina's Jacob Read, last of the southern Federalists. Stephen R. Bradley returned to take the place of Vermont's Elijah Paine. The mercurial James Jackson was again elected to one of the Georgia seats, this time to replace James Gunn, independent who had lately been very close to Hamilton. John Armstrong, a member by marriage of the Livingston clan, had already, during the second session of the Sixth Congress, taken one of the New York seats.

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[46] See Lynch, *op. cit.*, p. 124. Senator Greene lost his appointment through a technicality, Jefferson refusing to honor Adams' choice. Read served as judge of the South Carolina district court until his death in 1816.

[47] Beveridge, *op. cit.*, II, 552–558.

[48] *Senate Journal*, 6th Cong., 2d sess., Mar. 2, 1801, pp. 107–108.

[49] John Peter G. Muhlenberg was first elected to the seat, but resigned it after a few days' service.

The retirement of Gunn, together with that of Republican John Langdon, of New Hampshire, symbolized the end of an era. These two were the last of that hopeful group which had gathered in the second-floor chamber of Federal Hall in New York 12 years before to organize the Senate's first session.

As a result of these changes, wrought by one after another of the State legislatures, Congress convened on December 7, 1801, with the Republicans enjoying a 17-to-15 Senate majority.

This strange new majority lost no time in exercising its powers. Shortly after the session began, John Breckinridge, freshman Senator from Kentucky who had replaced the doughty semi-Federalist Humphrey Marshall, introduced a resolution calling for repeal of the Judiciary Act of the preceding year. On February 3, 1802, the Republicans pushed a bill to that effect to Senate passage by a vote of 16 to 15.[50] When such a "disorganizing" measure could emerge from the erstwhile Federalist stronghold, surely the world had turned upside down.

The importance of the fall of the Senate as the "focus of Federalism" to the political development of the United States should not be underestimated. It is extremely unlikely that the Republicans, having captured the Presidency and the lower Chamber, would have long tolerated continuance of the Senate as an obstacle to their effective control. Rumblings against the Senate had begun the very first year of its existence, when Senators busied themselves with titles of dignity and claims to superior status.. The rumblings became a roar after the Senate approved the Jay Treaty. Even as late as 1801, Jefferson's close friend, Edmund Pendleton, in his pamphlet, *The Danger Not Over*, on behalf of southern agrarians called for a sweeping reduction of the Senate's powers.[51] There is little question that the Republicans' capture of the upper Chamber at the same moment they captured the Presidency saved the Senate from a new attack, an assault which might well have seriously curbed its powers.

The "Why?" of Senate Federalism

This discussion of the Senate as the "focus of Federalism" naturally raises the question, "Why was the Senate so long the bulwark of the Federalist Party as compared to a reluctant or rebellious House?"

A complete answer to this question would necessitate a careful study of the politics of the 16 State legislatures which elected the Senators, a task beyond the scope of this paper. However, without attempting this task, a few generalizations can be made which will fairly adequately answer the question.

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[50] *Annals*, 7th Cong., 1st sess., Feb. 3, 1802, p. 183.

[51] See ch. IX, *supra*.

It will have been noted that Federalist strength in the Senate was highly sectional. Most of the outstanding Federalist leaders were from New England—Oliver Ellsworth, Caleb Strong, George Cabot, Theodore Sedgwick, and New York's transplanted Yankee, Rufus King. On the other hand, with the exception of Aaron Burr, the most dedicated Republican leaders came from the South, particularly Virginia—men like James Monroe, Henry Tazewell, and Stevens T. Mason. Votes on critical issues like assumption, the Bank of the United States, the Jay Treaty, and the Sedition Act were also highly sectional. In each case, the measure received stronger support in the Senate than in the House.

It might appear, then, at first glance that the Federalists won these heavier majorities in the Senate because of an overrepresentation in the Senate, compared to the House, of the Federalist Northern States. However, an analysis of the size of the delegations from the various States in the House indicates that this was not the case.

The States north of the Potomac at this time held 66 House seats and 20 Senate seats, or an average of 3.3 Representatives to each Senator.[52] The southern States held 40 House seats and 12 Senate seats, or an average of 3.33 Representatives to each Senator. The difference here is insignificant. Five of the seven States most overrepresented in the Senate were north of the Potomac—Delaware, New Jersey, Rhode Island, Vermont, and New Hampshire. However, in the lower House the Federalists enjoyed a somewhat comparable advantage—the underrepresentation of three rapidly growing Republican States in the South, Georgia, Tennessee, and especially Kentucky. The States underrepresented in the Senate were divided quite equally between the two sections, although the State most glaringly underrepresented was Virginia, the State which usually furnished much of the leadership and a solid phalanx of about 15 votes to the Republican cause in the lower House.

However, if the States are divided into three groups—New England, Middle States, and States south of the Potomac—and an analysis made of the relative strength of the two parties in the Senate compared to the House, a rather significant fact emerges.

It will be seen from the following charts that in New England the Federalists' predominance was of roughly equal extent in both Senate and House, while in the States south of the Potomac the Republicans' predominance was of roughly equal extent in both Houses. For instance, in a representative Congress, the Fifth, the Federalists in New England enjoyed a 9-to-1 superiority in the Senate and a 24-to-4 superiority in the House, while the Republicans in the South enjoyed an 8-to-2 superiority in the Senate (2 of the southern Senators being classified as independents) and a 32-to-8 superiority in the House. Thus in neither of these two sections did the Federalists enjoy much greater strength in the Senate than in the House.

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[52] For the purposes of this analysis Maryland is grouped with the Middle States because her politics at this time had most in common with that section.

TABLE 1.—*Party distribution, 4th Cong.*[1]

	House of Representatives		Senate		
	Federalist	Republican	Federalist	Republican	Independent
New England:					
Connecticut	7	0	2	0	0
Rhode Island	2	0	2	0	0
Massachusetts	11	3	2	0	0
Hew Hampshire	3	1	1	1	0
Vermont	1	[2] 1	1	1	0
Total	24	5	8	2	0
Middle States:					
New York	5	5	1	1	0
Pennsylvania	4	9	2	0	0
Delaware	0	1	2	0	0
New Jersey	5	0	2	0	0
Maryland (1?)	3	4	1	1	0
Total (1?)	17	19	8	2	0
South:					
Virginia	4	15	0	2	0
North Carolina	1	9	0	2	0
South Carolina	2	4	1	1	0
Georgia	0	2	[3] 1	0	1
Kentucky	0	2	1	1	0
Tennessee	0	1	0	2	0
Total	7	33	3	8	1
Grand total (1?)	48	57	19	12	1

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[1] The sources of the information concerning party affiliations shown in this and the following tables are: for House Members, Dauer, *op. cit.*, tables 15, 19, and 21, pp. 297, 316, 326; for Senators, standard bibliographical encyclopedias and voting records as shown in *Senate Journal* and *Annals*.

Dauer specified that 15 of the Federalist House Members and 14 of the Republican House Members were "moderates."

[2] This Republican was replaced by a Federalist during this Congress.

[3] This Federalist served only 2 months and was then replaced by a Republican.

TABLE 2.—*Party distribution, 5th Cong.*[1]

	House of Representatives		Senate		
	Federalist	Republican	Federalist	Republican	Independent
New England:					
Connecticut	7	0	2	0	0
Rhode Island	1	1	2	0	0
Massachusetts (1?)	11	2	2	0	0
New Hampshire	4	0	1	1	0
Vermont	1	1	2	0	0
Total (1?)	24	4	9	1	0
Middle States:					
New York	6	4	2	0	0
Pennsylvania	6	7	2	0	0
Delaware	1	0	2	0	0
New Jersey	5	0	2	0	0
Maryland	6	2	1	[2] 1	0
Total	24	13	9	1	0
South:					
Virginia	4	15	0	2	0
North Carolina	1	9	0	2	0
South Carolina	3	3	1	0	1
Georgia	0	2	0	1	1
Kentucky	0	2	1	1	0
Tennessee	0	1	0	2	0
Total	8	32	2	8	2
Grand total (1?)	56	49	20	10	2

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[1] Dauer specified that 12 of the Federalist House Members and 7 of the Republican House Members were "moderates."

[2] This Republican was replaced by a Federalist during this Congress.

TABLE 3.—*Party distribution, 6th Cong.*[1]

	House of Representatives		Senate		
	Federalist	Republican	Federalist	Republican	Independent
New England:					
Connecticut	7	0	2	0	0
Rhode Island	2	0	2	0	0
Massachusetts	12	2	2	0	0
New Hampshire	4	0	1	1	0
Vermont	1	1	2	0	0
Total	26	3	9	1	0
Middle States:					
New York	4	6	2	0	0
Pennsylvania	5	8	2	0	0
Delaware	1	0	2	0	0
New Jersey	2	3	2	0	0
Maryland	5	3	2	0	0
Total	17	20	10	0	0
South:					
Virginia	8	11	0	2	0
North Carolina	5	5	0	2	0
South Carolina	5	1	1	1	0
Georgia	2	0	0	1	1
Kentucky	0	2	1	1	0
Tennessee	0	1	0	2	0
Total	20	20	2	9	1
Grand total	63	43	21	10	1

[1] This was not a typical year; the XYZ crisis brought an inordinate number of Federalist House Members from the South, many of whom did not vote with their party after arriving in the Capital.

Dauer specified that 11 of the Federalist House Members and 2 of the Republican House Members were "moderates."

However, the Middle States presented a different picture. There the Federalists were at a decided advantage in the Senate compared to the House. Again referring to the Fifth Congress, the Federalists in these States enjoyed a 9-to-1 superiority in the Senate but only a 24-to-13 superiority in the House. Narrowing the analysis to individual States, the most significant figures are those reflecting the situation in New York and Pennsylvania. In the Fifth Congress, New York Federalists held both Senate seats but only 6 out of 10 House seats; Pennsylvania Federalists held both Senate seats but only 6 out of 13 House seats. It will be noted from the tables that in the Fourth and Sixth Congresses the Federalists in these two States enjoyed an even greater superiority in the Senate than in the House.

The surplus Federalist strength in these States, as reflected in Senate membership, was apparently due to the action of the "filtering" process in the State legislatures, the members of these bodies being more conservative than the voters and thus choosing Senators of the more conservative Federalist Party. The fact that this was as the constitutional fathers planned probably did not bring much comfort to the Republicans.

In New England, the election of Federalist Senators by the legislatures apparently was in line with the wishes of the voters, as evidenced by their overwhelming support of Federalist House Members. In the South, the legislatures usually elected Republican Senators as an expression of States' rights sentiment and sectional interest, the legislators being convinced that the Federalists' administration of the National Government was being conducted to the advantage primarily of the commercial and financial elements of the North.

Another significant factor resulting in greater Federalist strength in the Senate compared to the House was the fact that Federalists in the lower Chamber often tended to be more moderate in their Federalism than the Senators. In session after session the Federalists enjoyed nominal majorities in the lower House only to find that they could not count in advance on the party loyalty of many Members on critical votes. A more immediate responsibility to the voters in their districts—in most cases agrarian in their basic economy—no doubt had its effect in discouraging too close allegiance to the Federalist Party line with its commerce and finance orientation.

Many Federalist Senators, on the other hand, were quite notorious for their frank indifference to the sentiments of the humbler elements in society, who allegedly were not qualified to judge their own best interests.

The Federalist period was, indeed, unique in the early history of the Senate for its attachment to the interests of the bank, the counting-house, and the trading enterprise. This attachment was quite evident in the Chamber's leadership as well as in its voting conduct, and goes further in explaining the animosity to the Senate of the southern agrarian leaders than the more emotion-packed cry of "aristocracy"—especially when one considers the contemporary social structure of the South. At the Constitutional Convention the discussion regarding the Senate had been largely conducted in terms of a horizontal conflict between the rich and poor. The conflicts of the Federalist period, although often on the surface fought along those lines, were more significantly a conflict between two vertical groups of economic interests.

Following the period discussed in this paper, one western or southwestern State after another was admitted to the Union in rapid succession—Ohio in 1803, Louisiana in 1812, Indiana in 1816, Mississippi in 1817, Illinois in 1818, and Alabama in 1819. During this period, only one new northeastern State—that of Maine—was admitted. Sparsely populated as they were, the new agricultural States beyond the Alleghenies were heavily overrepresented in the Senate compared to the House. Thus in only two decades the Senate made a total about-face and become the focus of agrarianism, while the more heavily populated business centers of the East enjoyed a more numerous representation in the lower House.

However, it was not primarily the invasion of the Senate Chamber by Senators representing newly admitted western and southwestern States that broke the power of Federalism in the Senate, although in this struggle frontier Senators from Tennessee and Kentucky did their share. Before the full brunt of this invasion took place, the keepers of the Federalist castle, with no new program to capture the imagination of the country, had fallen prey to their own division and petulance. But under new banners and with a closer identity with the people it represented, the Senate itself survived, to face with a growing country an illustrious future.

APPENDIX

Rules Adopted by the First United States Senate

(From the Annals of Congress, 1st session, 1st Cong., April 16 to 18, 1789, pp. 20-21)

I. The President having taken the chair, and a quorum being present, the journal of the preceding day shall be read, to the end that any mistakes may be corrected that shall have been made in the entries.

II. No member shall speak to another, or otherwise interrupt the business of the Senate, or read any printed paper while the journals or public papers are reading, or when any member is speaking in any debate.

III. Every member, when he speaks, shall address the chair, standing in his place, and when he has finished shall sit down.

IV. No member shall speak more than twice in any one debate on the same day, without leave of the Senate.

V. When two members shall rise at the same time, the President shall name the person to speak; but in all cases the person first rising shall speak first.

VI. No motion shall be debated until the same shall be seconded.

VII. When a motion shall be made and seconded, it shall be reduced to writing, if desired by the President, or any member, delivered in at the table, and read by the President before the same shall be debated.

VIII. While a question is before the Senate, no motion shall be received unless for an amendment, for the previous question, or for postponing the main question, or to commit, or to adjourn.

IX. The previous question being moved and seconded, the question for the chair shall be: "Shall the main question now be put?" and if the nays prevail, the main question shall not then be put.

X. If a question in a debate include several points, any member may have the same divided.

XI. When the yeas and nays shall be called for by one-fifth of the members present, each member called upon shall, unless for special reasons he be excused by the Senate, declare, openly and without debate, his assent or dissent to the question. In taking the yeas and nays, and upon the call of the House, the names of the members shall be taken alphabetically.

XII. One day's notice at least shall be given of an intended motion for leave to bring in a bill.

XIII. Every bill shall receive three readings previous to its being passed; and the President shall give notice at each, whether it be the first, second, or third; which readings shall be on three different days, unless the Senate unanimously direct otherwise.

XIV. No bill shall be committed or amended until it shall have been twice read, after which it may be referred to a committee.

XV. All committees shall be elected by ballot, and a plurality of votes shall make a choice.

XVI. When a member shall be called to order, he shall sit down until the President shall have determined whether he is in order or not; and every question of order shall be decided by the President, without debate; but, if there be a doubt in his mind, he may call for the sense of the Senate.

XVII. If a member be called to order for words spoken, the exceptionable words shall be immediately taken down in writing, that the President may be better enabled to judge the matter.

XVIII. When a blank is to be filled, and different sums shall be proposed, the question shall be taken on the highest sum first.

XIX. No member shall absent himself from the service of the Senate without leave of the Senate first obtained.

XX. Before any petition or memorial, addressed to the Senate, shall be received and read at the table, whether the same shall be introduced by the

President or a member, a brief statement of the contents of the petition or memorial shall verbally be made by the introducer.

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